(24,462)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 296.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. L. LLOYD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1915.

1 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
W. L. LLOYD, Defendant in Error.

Petition for Writ of Error.

Comes now Southern Railway Company, the above named plaintiff in error, and says:

That on the 25th day of May, 1914, judgment in this suit was rendered by the Supreme Court of North Carolina which is the highest court in the State in which a decision in the suit could be had, against this defendant therein, and thereafter, to-wit, on the 4th day of June, 1914, the remittitur from said court was filed in the Superior Court of Guilford County, North Carolina, directing and adjudging that the judgment of said Superior Court be affirmed; whereupon said judgment became final.

In said suit a title, right, privilege, and immunity was duly and specially set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the title, right, privilege, and immunity so set up and claimed, all of which will more fully and in more detail appear in the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully prays that
2 a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of and that an order be entered fixing the amount of a supersedeas bond herein.

JOHN N. WILSON,
GARLAND S. FERGUSON, JR.,
Attorneys for Southern Railway Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by Southern Railway Company, payable to W. L. Lloyd, in the sum of Twenty-five thousand dollars such bond when approved to act as a supersedeas.

12 November, 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 THE STATE OF NORTH CAROLINA:

In the Supreme Court.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
W. L. LLOYD, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the Southern Railway Company, the above named plaintiff in error, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

This was a civil action instituted by the defendant in error, W. L. Lloyd, against Southern Railway Company, plaintiff in error, and the North Carolina Railroad, to recover damages for personal injuries to said plaintiff, alleged to have been caused by the negligent acts of said defendants on January 12, 1911, while said W. L. Lloyd was employed by said Southern Railway Company, in the capacity of engineer, and was engaged in his duties as such. The injury was caused by the lever of the ashpan damper striking him, as he was inspecting his engine. The defendant in error was preparing to take the engine which had just been repaired, on a trial trip from Spencer, North Carolina, to Barber, North Carolina, a distance of eleven miles and wholly within the State of North Carolina. At the time of the accident the engine was standing on a siding of the Southern Railway Company and not on the right of way of the North Carolina Railroad, and in going upon its
4 trial trip the engine at no time would have been upon or have passed over the tracks of the North Carolina Railroad.

Southern Railway Company, defendant, in the court below, and plaintiff in the Supreme Court of the United States, respectfully assigns as errors in the records and proceedings in this cause, in the Supreme Court of North Carolina, the following:

(1) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in overruling the plea of the defendant, Southern Railway Company, to the jurisdiction of the Court to try the cause and its objection to the trial by the Superior Court of Guilford County.

(2) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining the motion of the defendant, Southern Railway Company, made at the close of the plaintiff's testimony to dismiss the case as upon nonsuit under the Hinsdale Act.

(3) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining the motion of the defendant, Southern Railway Company, made at the close of all the testimony, to dismiss the case as upon a nonsuit under the Hinsdale Act.

(4) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in submitting the issues as shown in the record and declining to submit the issues tendered by the defendant, the Southern Railway Company, as set out in the case on appeal.

(5) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining to give the following instructions requested by the defendant,
5 Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an extra engineer in the service of the defendant, and had been in the continuous service of the defendant from June, 1910, until January, 1911, at the time he was hurt, and that on the day he was hurt he was assigned to the duty of examining and inspecting engine No. 579 and taking it out upon a trial trip in order to test the engine and its apparatus and parts to ascertain whether or not they were in proper condition and repair; and the jury further find from the evidence that the engine had been in the shops for repairs and had been repaired and that the nuts upon the ash pan damper which controlled the operation and adjustment of the lever had not been properly adjusted, then it was the duty of the plaintiff to see that they were properly adjusted, and if the jury find that the injury was caused by the improper adjustment of said nuts, this would not be negligence on the part of the defendant for which the plaintiff could recover, and the jury should answer the first issue 'No.'"

(6) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that it was the duty of the plaintiff to examine, inspect and test the engine for the purpose of ascertaining whether or not it was in serviceable condition, and in order to discover whether or not it had been properly repaired, and he was injured by reason of a failure to adjust any part of the engine which it was his duty to inspect and adjust or report its condition, then the defendant would not be liable for any injury he sustained on account of the improper adjustment of such part; and if the jury further find that his injury was caused by the failure to adjust such machinery, which it was his duty to inspect and test, then the jury should answer the first issue 'No.'"

(7) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the lever to the ash pan damper had been so adjusted by means of the nuts that it was too tight for ordinary use and service, and that the plaintiff undertook to operate the lever and pulled upon it with his hands and stood in such a position that his head was immediately over the lever,
6 and that by reason of his pulling it loose from its fastening it flew up and struck his face, this would not be the negli-

gence of the defendant as alleged in the plaintiff's complaint, and the jury should answer the first issue 'No.'"

(8) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in declining to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an employee of the defendant as an extra engineer without any regular run or assignment, but that he belonged to the division which extended from Spencer, North Carolina, to Monroe, Virginia, and that occasionally he worked upon an engine running from North Carolina into Virginia, and the jury should find from the evidence that engine No. 579, upon which he was injured, was ordinarily used in carrying trains from Spencer, North Carolina, to Monroe, Virginia, carrying freight or passengers between the two States; and the jury should further find that on the day the plaintiff was injured he was assigned to the duty of taking engine No. 579 from the shops in Spencer, North Carolina, to Barber Junction or Elmwood, North Carolina, both points being within the State of North Carolina, and it not being necessary to go outside of the State of North Carolina, without cars, either freight or passengers, attached, or without carrying passengers or freight of any kind, then the plaintiff, at the time he was injured, was not engaged in interstate commerce."

(9) The Supreme Court of North Carolina erred in holding and deciding that the trial judge did not commit error in charging the jury as follows:

"The Court charges you that if you find the facts to be as testified to by the witnesses, you will find that the proper way to operate the lever in question was for the operator to stand facing either the front or the rear of said engine, and to operate the lever with one hand, and if you find this to be true, the Court charges you that if you further find from the greater weight of the evidence that the lever in question was adjusted so tightly that it could not be operated with one hand by one standing facing the front or rear of said engine with reasonable safety to himself, that this would be negligence upon the part of the defendant, and you should so find; and if you should further find from the greater weight of the evidence that the plaintiff tried to operate said lever while so adjusted, and was injured thereby, and that said negligence was the proximate cause of the plaintiff's injury, you will answer the first issue 'Yes.' And by proximate cause, I mean the nearest or direct cause of the injury.

But if the plaintiff has failed to show these facts by the
7 greater weight of the evidence, you will answer the first issue 'No.' Or, if you should find from the evidence that the appliance in question was so adjusted that it could be operated with one hand by a person standing in the position above indicated, that is, facing either to the front or to the rear of the engine, with reasonable safety to himself, you will answer the first issue 'No.'"

(10) The Supreme Court of North Caro'ina erred in holding and

deciding that the trial judge did not commit error in charging the jury—

"If they found the facts to be true as testified by the witnesses in the case they would answer the second issue 'Yes.'"

(11) The Supreme Court of North Carolina erred in signing the judgment as appears in the record.

Wherefore, for these, and other manifest errors, appearing in the record, the said Southern Railway Company, plaintiff in error, prays that this judgment of the Supreme Court of North Carolina herein, dated —— —, 1914, be reversed, set aside and held for naught, and that a judgment be rendered for the plaintiff in error granting its rights under the Constitution and Statutes of the United States, and the plaintiff in error also prays for a judgment for costs in its favor.

JOHN N. WILSON,
GARLAND S. FERGUSON, JR.,
Attorneys for Southern Railway Company.

8 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Southern Railway Compony, plaintiff in error, versus W. L. Lloyd, defendant in error, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,
9 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, the 12th day of November, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk District Court of United States,
District of North Carolina.

Allowed:
WALTER CLARK,
Chief Justice of the Supreme
Court of North Carolina.

10 *Return of Writ.*

UNITED STATES OF AMERICA,
Supreme Court of North Carolina, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of North Carolina, in the City of Raleigh, this seventh day of December, 1914.

[Seal of the Supreme Court of the State of North Carolina]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

11 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. L. Lloyd, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of North Carolina, this 12 day of Nov., 1914.

WALTER CLARK,
Chief Justice of the Supreme Court of
the State of North Carolina.

Attest:

____ ____,
Clerk of the Supreme Court
of the State of North Carolina.

STATE OF NORTH CAROLINA,
County of Guilford:

I, the undersigned attorney of record for the defendant in error of the above entitled cause, hereby acknowledge due service
12 of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

A. L. BROOKS,
Attorneys for W. L. Lloyd.

13 *Certificate of Lodgment.*

SUPREME COURT,
State of North Carolina, ss:

I, J. L. Seawell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Nov. 12, 1914, in the matter of Southern Railway Company, Plaintiff in Error versus W. L. Lloyd, Defendant in Error:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth,—one for the defendant, and one for file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Raleigh N. C., this 12 day of Nov., 1914.

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

14 In the Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
W. L. LLOYD, Defendant in Error.

Bond.

Know all men by these presents: That we, Southern Railway Company, a corporation of the State of Virginia, as Principal, and A. B. Andrews as surety, are held and securely bound unto the above named W. L. Lloyd, in the sum of Twenty-five thousand dollars ($25,000) to be paid to him for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of —— in the year of our Lord one thousand nine hundred and fourteen.

Whereas, the above named Southern Railway Company, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of North Carolina.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be
15 void, otherwise to remain in full force and virtue.

SOUTHERN RAILWAY CO PANY,
By WILSON & FERGUSON, *Attorneys.*
A. B. ANDREWS. [SEAL.]

NORTH CAROLINA,
Wake County:

A. B. Andrews, being duly sworn, deposes and says, that he is worth double the amount of the above bond over and above all debts and liabilities and exemptions allowed by law.

A. B. ANDREWS.

Sworn and subscribed this 12th day of November, 1914.

[L. S.] FRANK P. HAYWOOD,
Notary Public.

Commission expires M'ch 1, 1916.

This bond approved this 12 day of Nov., A. D. 1914, and to operate as a supersedeas.

Approved:
WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

16 No. —.

W. L. LLOYD
against
SOUTHERN RAILWAY COMPANY.

From Guilford.

Before Peebles, Judge. Plaintiff appealed.

Be it remembered that on December 1, 1911, W. L. Lloyd sued out of the Superior Court of Guilford County a summons in the following words:

Summons for Relief.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD CO. and SOUTHERN RAILWAY COMPANY.

State of North Carolina to the sheiff of Guilford County, Greeting:

You are hereby commanded to summon the North Carolina Railroad Company and the Southern Railway Company, the defendants above named, if to be found within your county, to be and appear before the Judge of our Superior Court to be held for the county of Guilford at the courthouse in Greensboro, on the 11th day of December, 1911, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of the term, and let the said defendant take notice that if they fail to answer the said complaint, within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint and the cost of this action to be taxed by the Clerk.

17 Herein fail not and of this summons make due return.

Given under my hand and seal of said Court, this 1st day of December, 1911.

JAS. W. FORBIS,
Clerk Superior Court Guilford County.

Application to Sue as Pauper.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and the SOUTHERN RAILWAY COMPANY.

To the Clerk of the Superior Court of Guilford County:

This is to certify that I have examined the case of the plaintiff in the above entitled action and believe that he has a good and meritorious cause of action in fact of law.

A. L. BROOKS, *Attorney.*

NORTH CAROLINA,
Guilford County:

W. L. Lloyd, being duly sworn, says that he is unable to give sureties and make the deposit required by law to enable him to prosecute the above entitled action against the defendants, the North Carolina Railroad Company and the Southern Railway Company, and therefore prays that he may be allowed to sue in said action as a pauper.

W. L. LLOYD.

Sworn to before me this 1st day of December, 1911.
JAS. W. FORBIS,
Clerk Superior Court.

Order Granting Leave to Sue as a Pauper.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY.

In the above entitled action, upon the certificate and affidavit above set forth, it is ordered:

18 1. That the above named W. L. Lloyd be allowed to prosecute his said suit as a pauper.

2. That A. L. Brooks, Esq., be assigned as counsel to prosecute the said action.

This the 1st day of December, 1911.

JAS. W. FORBIS, *C. S. C.*

Complaint.

NORTH CAROLINA,
Guilford County:

In the Superior Court, December Term, 1911.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and the SOUTHERN RAILWAY COMPANY.

The plaintiff, complaining of the defendants, alleges:

1. That at the time of the injuries hereinafter complained of he was, and still is, a resident and citizen of the county of Guilford and State of North Carolina.

2. That the defendant, the North Carolina Railroad Company, is, and was at the time of the injuries complained of, a corporation duly chartered and organized under the laws of the State of North Carolina, and owning a line of railroad extending from Goldsboro, North Carolina, through Greensboro, Spencer and Salisbury to Charlotte, North Carolina, with its principal office in the town of Burlington, North Carolina.

3. That the defendant, the Southern Railway Company, is, and was at the time of the injuries hereinafter complained of, a corporation duly chartered and organized under the laws of the State of Virginia, and as such was a common carrier engaged in the business of interstate commerce, transporting freight and passengers along and over its line, extending from the city of Washington, District of Columbia, south through Greensboro and over the North Carolina track from Greensboro through Spencer, Salisbury and Charlotte, North Carolina.

4. That the defendant Southern Railway Company on Au-
19 gust 16, 1905, leased from its co-defendant the North Carolina Railroad Company its entire line of road and side-tracks along same from Goldsboro to Charlotte, and that at the time of the injury herein complained of was operating as such lessee the said road and sidetracks at Spencer, upon which the plaintiff was injured. That said lease, among other things, provides for the liability of the Southern Railway Company for all of its acts and defaults in the operation of said road and for a deposit of "not less than $175,000 in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract of lease to be performed by the lessee, and among them "to pay any judgment or judgments recovered in any Court of the State or of the United States when finally adjudicated for any tort, wrong, injury, negligence, default or contract, done, made or permitted by the parties of the second part, its successors, assigns, employees, agents or servants for which the party of the first part shall be adjudged liable whether the party of the first part is sued jointly with or separately from the party of the second part."

5. That the defendant, Southern Railway, as such lessee, by and with the consent of the North Carolina Railroad Company, uses and controls that part of the North Carolina Railroad Company's tracks from Greensboro through Spencer to Salisbury, North Carolina, as a part of its trunk line from north to south, along and over which it was, and is, engaged by and with the consent of the North Carolina Railroad Company in transporting interstate commerce from Virginia and all points of North to South Carolina, Georgia and other points south, and as such is jointly liable with the North Carolina Railroad Company for all torts and injuries committed on said lines of road.

6. That on the 12th day of January, 1911, and for some time
20 prior thereto, the plaintiff, W. L. Lloyd, was and had been employed by the defendant Southern Railway Company as engineer upon its freight trains then and there running over

and along said line of road from Spencer, North Carolina, to Monroe, Virginia, and engaged in hauling interstate traffic.

7. That on the 12th day of January, 1911, the plaintiff was ordered and directed as engineer aforesaid to take charge of engine No. 579 at Spencer, which had just come from the repair shops, and to ascertain whether or not said engine was in serviceable condition. That the plaintiff accordingly, as directed, took the engine, which he was unaccustomed to operating, upon one of the sidetracks of the North Carolina Railroad Company's main line at Spencer and was oiling and inspecting same. That while stooping over and looking under the engine to ascertain if the ash pan and other equipments were in proper condition a lever about two feet long, which was located at the rear of the driving wheel and the lower side of the engine, used for the purpose of operating the damper to the ash pan, tripped and violently struck the plaintiff in the forehead, crushing his skull and driving portions of same into the brain.

8. That the machinery used upon said engine for controlling the damper to said ash pan by means of this lever was defective and dangerous, and so known to be by the defendant Southern Railway Company. That its defects and dangers were known to this plaintiff.

9. That the said engine was sent out from the shops with the machinery used for controlling the damper upon said ash pan improperly adjusted and seriously defective, rendering it liable to be tripped by the slightest jar, causing the lever to fly from its accustomed place with great force, violently striking any object that happened to be in its course, which facts were known, or ought to have been known, by the defendant Southern Railway Company.

10. That the plaintiff was employed by the defendant, Southern Railway Company, as engineer for the purpose of transport-
21 ing interstate commerce from, to and between Spencer, North Carolina, and Monroe, Virginia, and along the main line of the Southern Railway Company, a part of which said line included that portion of the North Carolina Railroad Company's lines leased by the Southern Railway Company from Greensboro, North Carolina, to Spencer, North Carolina, and that the engine upon which said plaintiff was hurt was, and had been, exclusively used by the Southern Railway Company in the transportation of interstate commerce along and over said line of road between the points of Spencer, North Carolina, and Monroe, Virginia, and the plaintiff at the time of the injury aforesaid was in charge of said engine.

11. That the defendants were negligent in the performance of the duty which they owed this plaintiff, in that they furnished him from their shops an engine with an unsafe and dangerous appliance, knowing the same to be unsafe and dangerous, and that said appliance was improperly and insecurely adjusted and attached, thereby rendering his employment hazardous and dangerous and unnecessarily exposing him to great peril.

12. That by reason of the negligent acts and conduct of the defendants, as hereinbefore alleged, plaintiff was greatly injured and damaged, his skull crushed, his brain punctured, his eyesight se-

riously and permanently impaired and his hearing rendered very imperfect. That on account of said injury a portion of the plaintiff's skull has been removed, leaving a part of his forehead without the protection afforded by nature, and irritation has been set up in his head, producing a bloody discharge, from which he has and does continue to suffer. That he has been rendered nervous and unable to sleep, his general health greatly undermined and his physical condition so impaired that he has been rendered a wreck for life, to his great damage in the sum of forty thousand dollars.

22 13. That the plaintiff at the time of the injury herein complained of was engaged as an employee of the Southern Railway Company for it in interstate commerce, and was injured by an engine then and there being used by the Southern Railway Company in interstate commerce, and the plaintiff invokes for his protection the Federal statutes in such cases made and provided.

Wherefore, the plaintiff prays that he may recover of the defendants the sum of forty thousand dollars and the cost of this action to be taxed by the Clerk.

A. L. BROOKS,
C. A. HALL,
Attorneys for Plaintiff.

NORTH CAROLINA,
Guilford County:

W. L. Lloyd, first being duly sworn, deposes and says that he has read the foregoing complaint, and that the same is true of his own knowledge except as to those things therein stated on information and belief, as to those *be* believes it to be true.

W. L. LLOYD.

Sworn to and subscribed before me this 1st day of December, 1911.

M. W. GANT,
Deputy Clerk Superior Court.

Petition to Remove This Cause to the United States Circuit Court for the Western District of North Carolina.

NORTH CAROLINA,
Guilford County:

Superior Court, December Term, 1911.

W. L. LLOYD
v.
THE SOUTHERN RAILWAY COMPANY and the NORTH CAROLINA RAILROAD COMPANY.

To the Honorable the Superior Court of the County of Guilford, State of North Carolina:

23 Your petitioner, the Southern Railway Company, a corporation originally created, organized and existing under the

laws of the State of Virginia, respectfully showeth that it is the defendant in the above entitled suit or civil action, which was begun against it in the said Superior Court of Guilford County, North Carolina, by the issuance and service of a summons, and that a complaint has been filed in said action, and that the defendant, your petitioner, files this *this* petition at or before the time when it is obliged to answer or demur to the complaint.

That the matter in controversy therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the said suit is of a civil nature, and is an action for the recovery of forty thousand ($40,000) dollars, for damages alleged to have been incurred by the negligence of your petitioner.

Your petitioner further states that, in the said above mentioned civil action, there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which is a corporation originally created, organized and exists under and by virtue of the laws of the State of Virginia, and was at the commencement of this action, and still is, a citizen of the State of Virginia, and not a citizen and resident of the State of North Carolina, and the said W. L. Lloyd, who, your petitioner avers, was at the commencement of this action and still is, a citizen and resident of the State of North Carolina, and of the Western District thereof, and not as a citizen and resident of the State of Virginia, and that both the said W. L. Lloyd and your petitioner are actually interested in said controversy and *was* so interested at the beginning thereof, and still *is* so interested in said controversy.

Your petitioner denies that the lease from the North Caro-
24 lina Railroad Company to it bears date, or was effected, on August 16, 1905, but avers the fact to be that the said lease was executed during the year 1895, and was recorded in the office of the Register of Deeds of Guilford County on August 16, 1895, in Book of Deeds 99, page 596, and was to become effective for a period of 99 years from January 1, 1896; and further denies that it is operating as lessee under said lease any sidetracks or other portions of its line from Goldsboro to Charlotte, not included within the 100 feet right-of-way of the said North Carolina Railroad Company.

Your petitioner expressly denies so much of paragraph seven of the complaint as says that "the plaintiff accordingly as directed, took the engine which he was unaccustomed to operating, upon one of the sidetracks of the North Carolina Railroad Company's main line at Spencer," and alleges the truth and fact to be that the cinder pit or side track upon which the engine was located, at the time plaintiff was working thereon, was upon land owned by the Southern Railway and upon which it has built a track, subsequent to the lease by the said North Carolina Railroad Company, said track and land being a portion of the property bought by your petitioner for its own purposes and use, forming what is known as the Spencer Shops, at Spencer, N. C., said sidetracks and shops being built in the year 1897, said cinder pit or track as aforesaid being, by actual measurement, approximately 340 feet from the nearest point of the right-of-way

of the North Carolina Railroad Company, it being 440 feet from the center of the right-of-way of said North Carolina Railroad Company, said right-of-way being 100 feet on either side of the main line of the North Carolina Railroad Company, which is now called the south bound main line, the same being identical in location, and is situated 220 feet within the property of the said Southern Railway Company, enclosed by a fence forming its shops and round house, said
25 cinder pit being a part of the round house of your petitioner, situate at Spencer, N. C., and used by your petitioner in the construction and repair of the engines for service over all its properties, and your petitioner further says that the cinder pit or sidetrack upon which the engine was located at the time the plaintiff received his injuries, was not the property of the North Carolina Railroad Company, nor was it a part of the line of railway and properties included — the lease as aforesaid, nor was it used by your petitioner as a part of said properties so leased.

Your petitioner denies that the plaintiff, W. L. Lloyd, was on the 12th day of January, 1911, "employed by the defendant, the Southern Railway Company, as engineer upon its freight trains then and there running over and along said line of road from Spencer, N. C., to Monroe, Va., and engaged in hauling interstate traffic," and likewise denies so much of the allegations of paragraph ten of the complaint as are intended to alleged that on the 12th day of January, 1911, plaintiff was employed for the purpose, or was engaged in transporting interstate commerce, and that the engine upon which plaintiff was hurt was and had been exclusively used by your petitioner in the transportation of interstate commerce; and your petitioner likewise denies the allegations of paragraph thirteen of the complaint; and avers the facts and truth in this connection to be that engine No. 579, this being the engine upon which the plaintiff was working at the time of his injury, was sent into the shops at Spencer on December 16, 1910, for overhauling and repairs, and after the conclusion of said work, it was on January 12, 1911, sent to the cinder pit as aforesaid, preparatory to being given a trial run, in order to test the sufficiency of the overhauling and repairs. The plaintiff was not assigned to any certain engine, or to any certain run, but had theretofore run engines with trains from Spencer, N. C., to Monroe, Va., and from Spencer, N. C., to Selma, N. C., and to other points, and on the day in question, to wit, January 12, 1911,
26 the plaintiff was not engaged in, neither was he employed by your petitioner in interstate commerce, but had been directed on that day, to prepare engine No. 579 and was so engaged at the time of the injury for a trial trip as aforesaid, said trip to be to Barber's Junction, N. C., and return over the line of the Western North Carolina Railroad, one of the branches belonging to your petitioner, and after this engine had been given a trial trip, he was to take other engines on similar trips, and on the day in question was not to be engaged as employee of your petitioner in any other service, and your petitioner states that, after the injury to the plaintiff as aforesaid, another engineer, to wit, C. H. Chandler, took the said engine, No. 579, and gave it a trial trip, for which service and duty plaintiff

was called, to wit, he took the engine to Barber's Junction and return. Said engine was not to be, on this trial trip, attached to any train moving commerce of any kind.

Your petitioner says that the plaintiff, at the time he received the injuries complained of, was an employee of your petitioner, and not an employee of its co-defendant, the North Carolina Railroad Company, and was not, and never had been an employee of the said North Carolina Railroad Company, and that all the said facts herein set forth, with reference to the lease, the location and situation of the cinder pit and sidetrack, and the duties which the plaintiff was to perform on the day in question, were well known to plaintiff, when this action was brought and complaint filed. Your petitioner further says that, to avoid the removal of this case by it to the Federal Court, the plaintiff joined the North Carolina Railroad Company, a North Carolina corporation, and falsely and fraudulently alleged in his complaint that the sidetrack upon which the engine was located at the time he was injured was, "one of the sidetracks of the North Carolina Railroad Company's main line at Spencer," and falsely and likewise fraudulently alleged in his complaint that he suffered injury while employed by your petitioner in inter-
27 state commerce, and falsely and fraudulently alleges that he was engaged in interstate commerce at the time of his injury, and that said engine was likewise so engaged, when, at the time said allegations were made, plaintiff well knew that they were untrue, or could, by the exercise of the slightest diligence, have ascertained the true facts in connection therewith, and your petitioner further states that plaintiff did not and does not expect to establish said allegations and did not make them for the purpose of proving them at the trial or substantiating his cause of action therewith, but made them solely for the purpose of setting up a joint cause of action against the defendants, as lessor and lessee, and to state a cause under the Employer's Federal Liability Act in order to make a case which would not be removable to the Federal Court.

Your petitioner alleges that the plaintiff, by reason of the matters and things set forth in his complaint, has no cause of action against the North Carolina Railroad Company, and consequently has no cause of action against the Southern Railway Company as lessee thereof, for that he was an employe solely of the Southern Railway Company, and received his injuries on the premises and property of the Southern Railway Company, and while engaged in the performance of a duty entirely disconnected from and with any property which was the property of the said Southern Railway Company by reason of the lease as aforesaid.

And your petitioner offers herewith a bond, with good and sufficient surety, in the sum of five hundred ($500) dollars, for its entering the Federal Court of the United States for the Western District of North Carolina, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold this action was wrongfully or improperly removed thereto, and for entering special bail, if such be required.

And your petitioner prays this Court to proceed no further
28 herein, except to make an order of removal, and to accept the surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Western District of North Carolina.

SOUTHERN RAILWAY COMPANY,
By MANLY, HENDREN & WOMBLE AND
WILSON & FERGUSON.

NORTH CAROLINA,
Forsyth County:

J. M. Bennett, being duly sworn, doth say that he is superintendent of one of the defendants, the petitioner in the above entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to those matters therein stated on information and belief, and as to these, he believes it to be true.

J. M. BENNETT.

Subscribed and sworn to before me this 14th day of December, 1911.

[NOTARIAL SEAL.] JOHN C. WALLACE,
Notary Public.

My commission expires July 24, 1913.

Bond for Removal of This Case to the United States District Court for the Western District of North Carolina.

NORTH CAROLINA,
Guilford County:

In the Superior Court, December Term, 1911.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and THE SOUTHERN RAILWAY COMPANY.

Know all men by these presents, that the Southern Railway Company as principal, and James A. Gray, of Forsyth County, North Carolina, as surety, are held and firmly bound to W. L. Lloyd, and all other persons whom it may concern, in the penal sum of five hundred dollars, for the payment of which, well and truly to
29 be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents, yet upon these conditions, the said Southern Railway Company having petitioned the Superior Court of Guilford County, in the State of North Carolina, for the removal of a certain cause, pending in the Superior Court of said county, wherein W. L. Lloyd is

plaintiff, and the Southern Railway Company is defendant, to the Circuit Court of the United States, in and for the Western District of North Carolina.

Now, therefore, if the Southern Railway Company, the petitioner, shall enter into the said Circuit Court of the United States on the first day of its next session, a copy of the said suit and shall well and truly pay all costs that may be awarded by the said Circuit Court of the United States, if the said Court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands and seals, this 14th day of December, 1911.

SOUTHERN RAILWAY COMPANY,
By MANLY, HENDREN & WOMBLE, *Attorneys.*

STATE OF NORTH CAROLINA,
County of Forsyth:

I, Jas. A. Gray, of said county of Forsyth and State of North Carolina, the surety named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of North Carolina, and a property holder therein; and that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property exempt by law from execution, and that I have property in the said State of North Carolina liable to execution of the value of more than five hundred dollars.

JAS. A. GRAY.

Sworn to and subscribed before me this 14th day of December, 1911.

[NOTARIAL SEAL.] JOHN C. WALLACE,
Notary Public.

My commission expires July 24, 1913.

30 *Order Denying Removal.*

NORTH CAROLINA,
Guilford County:

In the Superior Court, December Term, 1911.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and the NORTH CAROLINA RAILROAD COMPANY.

On considering the pleadings and the petition herein filed it is ordered that the said petition for removal be and the same is hereby denied, and thirty days from this date is allowed defendants to answer.

This 14th day of December, 1911.

O. H. ALLEN,
Judge Presiding.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court, December Term, 1911.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY.

Motion by the defendant to remove to the Federal Court. Motion overruled. Defendant Southern Railway Company excepts and appeals to the Supreme Court. Notice of appeal waived bond $35 adjudged sufficient. By consent defendant allowed 30 days to serve case on appeal and plaintiff allowed 30 days thereafter to serve counter case or exceptions.

Above proceedings were had December Term Superior Court for Guilford County, Honorable O. H. Allen, Judge presiding.

Answer of Southern Railway Company.

NORTH CAROLINA,
Guilford County:

Superior Court, February Term, 1913.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and the SOUTHERN RAILWAY COMPANY.

The defendant, Southern Railway Company, without waiv-
31 ing its exceptions heretofore noted to the refusal of the Court to remove this case, answers the complaint of the plaintiff and says:

1. That it is admitted that the plaintiff is and was on the 12th day of January, 1911, a citizen and resident of Guilford County and the State of North Carolina.

2. In answer to the allegations contained in the second article of the complaint the defendant, the Southern Railway Company, admits that the North Carolina Railroad Company is and was on the 12th day of January, 1911, a corporation duly chartered and organized under the laws of the State of North Carolina and owning a line of railroad extending from Goldsboro, N. C., through Greensboro, Spencer and Salisbury to Charlotte, N. C., with its principal office in the town of Burlington, N. C., but this defendant is advised and believes and so alleges that the North Carolina Railroad Company is not a proper party defendant to this action and was not at the time this action was instituted, and that the said North Carolina Railroad Company has been improperly joined as a party defendant, for the reasons, among others, set forth in the petition for removal.

3. That the allegations of the third article of the complaint are admitted, and the defendant avers that the Southern Railway Company is also engaged as a common carrier in the business of intrastate commerce transporting passengers and freight between points wholly within the State of North Carolina.

4. In answer to the fourth article of the complaint the defendant denies that the lease of the North Carolina Railroad Company to the defendant was executed or bears date of August 16, 1905, but avers the fact to be that the said lease was executed during the year 1895 and was recorded in the office of the Register of Deeds of Guilford County on August 16, 1895, in Book 99, at page 596, and was to become effective for a period of ninety-nine years (99) from January 1, 1896; and the defendant further denies that it was on the 12th day of January, 1911, operating as lessee under said lease any
32 side tracks or other portions of its line from Goldsboro to Charlotte, not included within the 100 feet right-of-way of the said North Carolina Railroad Company, and the defendant expressly denies that at the time of the injury complained of it was operating as such lessee the said road and side tracks at Spencer upon which the plaintiff was injured.

5. That the allegations of the fifth article of the complaint are admitted, except that it is denied that the Southern Railway Company is jointly liable with the North Carolina Railroad Company for all torts and injuries committed on said line of road, the Southern Railway Company being liable only for such torts or injuries as may be caused by the fault or negligence of the Southern Railway Company.

6. That the allegations of the sixth article of the complaint are not true as therein stated, and are denied. It is admitted that the plaintiff, W. L. Lloyd, was employed on the 12th day of January, 1911, and for some time prior thereto as an extra engineer, and that he had performed the duties of engineer upon trains running over and along said line of railway from Spencer, N. C., to Monroe, Va., and had engaged in hauling interstate traffic; and the defendant further avers that the said W. L. Lloyd had been employed by the defendant as engineer upon trains running wholly within the State of North Carolina, and engaged in hauling intrastate traffic, and the defendant denies that the said W. L. Lloyd, on the 12th day of January, 1911, was engaged in interstate traffic or commerce of any kind. All allegation of said sixth article of the complaint not herein admitted are denied.

7. That the allegations of the seventh article of the complaint are not true as therein stated and are denied, and the defendant avers that the facts in regard to the plaintiff's injury are as hereinafter stated in this answer by way of a further defense.

8. That the allegations of the eighth article of the complaint are denied.

33 9. That the allegations of the ninth article of the complaint are denied.

10. That the allegations of the tenth article of the complaint are denied.

11. That the allegations of the eleventh article of the complaint are denied.

12. In answer to the twelfth article of the complaint it is admitted that the plaintiff was injured, but the defendant denies that he was injured as severely or to the extent alleged in said twelfth article of the complaint, and that it is informed and believes that his injury was not permanent and that he has recovered from same, and the defendant denies that his injury was caused by the negligence or fault of the defendant.

13. That the allegations of fact in the thirteenth article of the complaint are denied.

And for a further defense the defendant says:

1. That on the 12th day of January, 1911, the plaintiff, W. L. Lloyd, being an extra engineer in the employment and service of the defendant Southern Railway Company was called and instructed to take charge of the engine No. 579, which had been thoroughly overhauled and repaired and was in good condition, and was instructed to operate said engine as engineer from the shops at Spencer, N. C., to Barber's Junction, a station upon the Western North Carolina branch of the Southern Railway Company, not a part of the North Carolina Railroad, upon a trial trip without either passenger or freight cars attached or freight or commerce or passengers of any kind whatever, and the defendant alleges that the duties of the said W. L. Lloyd upon said occasion for which he was called, and which he undertook to perform, were wholly independent of and unconnected with interstate commerce.

2. That the plaintiff, W. L. Lloyd, in obedience to his instructions reported for duty and took charge of said engine No.
34 579 where it was stationed in the round house of the Southern Railway Company, upon the property of the Southern Railway Company, and not any part of the land or tracks leased from the North Carolina Railroad Company, and ran said engine out of the round house to and over the cinder pit which was upon a sidetrack of the Southern Railway Company, and not a sidetrack of the North Carolina Railroad Company as alleged in the complaint, and was distant from the right of way of the North Carolina Railroad Company more than two hundred (200) feet.

3. That the plaintiff, W. L. Lloyd, after taking charge of said engine as engineer for the purpose of making the trial run as hereinbefore stated, and after running the engine to and over the cinder pit and after inspecting and oiling his engine, stepped down upon the ground and took hold of the lever of the ash pan damper and undertook to operate it, and negligently and carelessly handled the said lever in that he failed before releasing it to properly secure it with the apparatus provided for that purpose, and allowed the said lever to escape from his control and strike him on the head and injure him.

4. That the plaintiff did not stand in the proper position for operating the said ash pan lever, but negligently and carelessly stood so that his head was in such position that the lever came in contact

with it when it was released by him before being properly secured as hereinbefore stated.

5. That the plaintiff's negligence, as above alleged, in improperly operating the said lever to the ash pan damper and releasing the same before it was properly secured, and in standing in an improper position while operating the lever contributed to and was the proximate cause of any injury he sustained, and the defendant pleads the plaintiff's contributory negligence in bar of his right to recover in this action.

Wherefore, the defendant Southern Railway Company, having fully answered prays the judgment of the Court that the
35 plaintiff's action be dismissed, and that the defendant go hence without day and recover of the plaintiff and surety on his prosecution bond, the costs of this action to be taxed by the Clerk.

MANLY, HENDREN & WOMBLE,
WILSON & FERGUSON,
Attorneys for the Defendant Southern Railway Company.

C. A. Pamplin being duly sworn, is the agent of the Southern Railway Company at Greensboro, N. C., says that he has read the foregoing answer and that the same is true of his own knowledge, except those matters stated on information and belief, and as to those *be* believes to be true.

C. A. PAMPLIN.

Sworn to and subscribed before me this the 3d day of February, 1913.

JAS. W. FORBIS, *C. S. C.*

Answer of North Carolina Railroad Company.

NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1913.

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY.

The North Carolina Railroad Company, answering the plaintiff's complaint, says:

1. That it has no knowledge or information sufficient to form a belief as to the allegations contained in the first article of the complaint.

2. That the allegations of the second article of the complaint are admitted, but this defendant denies that it is a proper party defendant to his action and avers that it has been improperly joined

as a party defendant, for the reasons among others set forth in the petition for removal.

3. That the allegations of the third article of the complaint are, on information and belief, admitted.

36 4. In answer to the fourth article of the complaint the defendant North Carolina Railroad Company, denies that the lease of the North Carolina Railroad to the defendant was executed or bears date of August 16, 1905, but avers the fact to be that the said lease was executed during the year 1895 and was recorded in the office of the Register of Deeds of Guilford County on August 16, 1895, in Book 99, at page 596, and was to become effective for a period of (99) ninety-nine years from January 1, 1896; and the defendant further denies that the Southern Railway Company is or was on the 12th day of January, 1911, operating as lessee under said lease any sidetracks or other portions of its line from Goldsboro to Charlotte, not included with the one hundred feet right-of-way of the said North Carolina Railroad Company; and the North Carolina Railroad Company has no knowledge or information sufficient to form a belief as to the allegation in said fourth paragraph that at the time of the injury the Southern Railway Company was operating as such lessee said road and sidetracks at Spencer upon which the plaintiff was injured, and, therefore, denies the same to be true.

5. In answer to the allegations of the fifth article of the complaint it is denied that the Southern Railway Company is jointly liable with the North Carolina Railroad Company for all torts and injuries committed on said line of road, the Southern Railway Company being liable only for such torts or injuries as may be caused by the fault or negligence of the Southern Railway Company.

6. In answer to the sixth article of the complaint the defendant, North Carolina Railroad Company, has no knowledge or information sufficient to form a belief, and, therefore denies the same.

7. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the seventh article of the complaint, and, therefore, denies the same.

37 8. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the eighth article of the complaint, and, therefore, denies the same.

9. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the ninth article of the complaint, and, therefore, denies the same.

10. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the tenth article of the complaint, and, therefore, denies the same.

11. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the eleventh article of the complaint, and, therefore denies the same.

12. The defendant has no knowledge or information sufficient to form a belief as to the allegations contained in the twelfth article of the complaint, and, therefore, denies the same.

13. The defendant has no knowledge or information sufficient to

form a belief as to the allegations of fact contained in the thirteenth article of the complaint, and therefore, denies the same.

Wherefore, the defendant, North Carolina Railroad Company, having fully answered, prays the judgment of the Court that the plaintiff's action be dismissed and the defendant go hence without day and recover of the plaintiff, and the surety on his prosecution bond, the costs of this action to be taxed by the clerk.

MANLY, HENDREN & WOMBLE,
WILSON & FERGUSON,
Attorneys for Defendant North Carolina Railroad Co.

A. H. Eller being duly sworn, says that he is Secretary of the North Carolina Railroad Company, that he has read the
38 foregoing answer and the same is true of his own knowledge, except those matters stated on information and belief, and as to those he believes it to be true.

A. H. ELLER.

Sworn to and subscribed before me this the 3d day of February, 1913.

[NOTARIAL SEAL.] JNO. C. WALLACE,
Notary Public.

My commission expires July 24, 1913.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY CO., NORTH CAROLINA RAILROAD CO.

February Term Guilford County Superior Court, Hon. R. B. Peebles, Judge presiding, the following proceedings *are* had:

In this case the following jury are sworn and empaneled, to wit: A. Apple, J. M. Roney, J. M. Coble, R. B. Foust, J. B. Carter, J. C. Pierce, Iverson Stanley, Gurney Knight, Carl Gilbreath, T. G. McLean, A. T. Marable, R. N. Gilchrist. At the close of the plaintiff's evidence motion for judgment as of nonsuit. Plaintiff announces *they* will take nonsuit as to defendant North Carolina Railroad Company. Defendant moves to remove to the United States Court for trial as to defendant Southern Railway Company. Motion granted; plaintiff excepts and appeals to Supreme Court in open Court. Appeal bond $25.

39 *Petition to Remove to U. S. Court.*

NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

To the Honorable the Superior Court of the county of Guilford, State of North Carolina:

Your petitioner, the Southern Railway Company, a corporation originally created, organized and existing under the laws of the State of Virginia respectfully showeth:

That it is the defendant in the above entitled suit or civil action which was begun against it in the said Superior Court of Guilford County, North Carolina, by the issuance and service of a summons, and that a complaint has been filed in said action; and that this defendant heretofore at or before the time when it was obliged to answer or demur to the complaint filed a petition in the said Superior Court of Guilford County, North Carolina, for the removal of this cause to the United States Circuit Court for the western district of North Carolina, together with a bond with good and sufficient surety in the sum of five hundred ($500.00) dollars for its entering in the Circuit Court of the United States for the Western District of North Carolina on the first day of its then next session a copy of the record in this action, and for paying off all costs that might be awarded by said Court, if said Court should hold that this action was wrongfully or improperly removed thereto, and for entering special bail, if such be required.

And said petition further set forth that the North Carolina Railroad Company which had been joined in the summons in this cause was not a proper party defendant in said cause, and had been improperly and fraudulently joined by the plaintiff in order to defeat a removal of this cause to the United States Circuit Court;

40 And said petition further set forth that the matter in controversy in said cause exceeded, exclusive of interest and costs, the sum or value of two thousand ($2,000.00) dollars;

That said suit was of a civil nature and was an action for the recovery of forty thousand ($40,000.00) dollars for damages alleged to have been incurred by the negligence of your petitioner;

And said petition further set forth that in the above mentioned civil action there was a controversy which is wholly between citizens of different states, and which could be fully determined as between them, to wit: a controversy between your said petitioner, which is a corporation originally created, organized and existing under and by

virtue of the laws of the State of Virginia, and was at the commencement of this action and still is a citizen and resident of the State of North Carolina; and the said W. L. Lloyd — was at the commencement of this action and still is a citizen and resident of the State of North Carolina, and of the Western District thereof and not a citizen and resident of the State of Virginia; and that both the said W. L. Lloyd and your petitioner were mutually interested in the beginning thereof, and still *was* so interested in said controversy at the time of the filing of said petition.

And said petition denied the allegations of the complaint to the effect that the plaintiff was injured upon the property of the North Carolina Railroad Company leased to this defendant; and further denied that the plaintiff was an employee of the North Carolina Railroad Company;

And said petition further denied that the plaintiff, at the time of his injury was engaged in interstate commerce;

And the said petition so filed was not allowed by the Superior Court of Guilford County, North Carolina, and this defendant excepted to the order of said Superior Court refusing to remove said cause to the United States Circuit Court, and the said cause at
41 this, the February term, 1913, of Guilford Superior Court, coming on for trial and the plaintiff, at the close of his testimony, having taken a non-suit as to the North Carolina Railroad Company, and there being no evidence that the plaintiff, at the time he was injured, was engaged in interstate commerce, your petitioner respectfully files this petition, and respectfully shows to the Court that your petitioner, the Southern Railway Company is a corporation originally created, organized and existing under the laws of the State of Virginia, and that it is the defendant in the above entitled suit or civil action which was begun against it in the said Superior Court of Guilford County, North Carolina, by the issuance and service of summons, and that a complaint has been filed in said action;

That the matter in controversy therein exceeds exclusive of interest and cost, the sum of three thousand ($3,000.00) dollars; that the said suit or civil action is an action for the recovery of forty thousand ($40,000.00) dollars for damages alleged to have been incurred by the negligence of your petitioner.

Your petitioner further states that in the said above mentioned civil action there is a controversy which is wholly between citizens of different states which can be fully determined as between them, to wit: a controversy between your said petitioner which is a corporation originally created, organized and existing under and by virtue of the laws of the State of Virginia, and was at the commencement of this action and still is a citizen of the State of Virginia, and not a citizen and resident of the State of North Carolina; and the said W. L. Lloyd — was at the commencement of this action, and still is, a citizen and resident of the State of North Carolina and the Western District thereof, and not a citizen and resident of the State of Virginia, and that both the said W. L. Lloyd and your petitioner are materially interested in said controversy and were so interested at the beginning thereof and still are so interested in
42 said controversy.

Your petitioner further states that the North Carolina Railroad Company was improperly and fraudulently joined as a party defendant in this action in order to prevent the removal of this cause to the United States District Court and that the allegations were fraudulently and improperly made in the complaint that the plaintiff was engaged in interstate commerce in order to prevent the removal of this case to the United States District Court.

And your petitioner offers herewith a bond with good and sufficient surety in the sum of five hundred ($500.00) dollars for its entering in the District Court of the United States for the Western District of North Carolina on the first day of its next session a copy of the record in this action, and for paying all the costs that may be awarded by said District Court, if said court shall hold that this action was improperly or wrongfully removed thereto, and for entering special bail, if such be required.

And your petitioner prays this Court to proceed no further herein, except to make an order of removal and to accept the surety and bond and to cause the record herein to be removed into the said District Court of the United States for the Western District of North Carolina.

SOUTHERN RAILWAY COMPANY.
WILSON & FERGUSON, *Attorneys.*

STATE OF NORTH CAROLINA,
County of Guilford:

C. A. Pamplin, being duly sworn, doth say that he is agent of the defendant Southern Railway Company, the petitioner in the above entitled cause; and that he has read the foregoing petition and knows the contents thereof and that the same is true, except as to those matters therein stated on information and belief and as to these he believes it to be true.

C. A. PAMPLIN.

43 Sworn to and subscribed before me this the 20th day of February, 1913.

JAS. W. FORBIS, *C. S. C.*

Bond for Removal.

NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

Know all men by these presents, that the Southern Railway Company as principal, and the Illinois Surety Company of Chicago, Ill.,

as surety, are held and firmly bound unto W. L. Lloyd, and all other persons whom it may concern, in the sum of five hundred ($500.00) dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Southern Railway Company having petitioned the Superior Court of Guilford County in the State of North Carolina, for the removal of a certain cause pending in the Superior Court of said county, wherein W. L. Lloyd is plaintiff and the Southern Railway Company, is defendant, to the District Court of the United States, in and for the Western District of North Carolina.

Now, therefore, if the Southern Railway Company, the petitioner, shall enter into the said District Court of the United States on the first day of its next session, a copy of the said suit and shall well and truly pay all costs that may be awarded by the said District Court of the United States, if the said Court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

44 Witness our hands and seals, this the 18th day of February, 1913.

SOUTHERN RAILWAY CO.,
By WILSON & FERGUSON, *Att'ys.*
ILLINOIS SURETY CO.,
By G. S. FERGUSON, JR., *Att'y in Fact.*

The foregoing bond is approved, February 20, 1913.
JAS. W. FORBIS.

Order of Removal.

NORTH CAROLINA,
Guilford County:

In the Superior Court, February Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

This cause coming on to be heard before the undersigned judge and a jury at the February Term, 1913, of the Superior Court of Guilford County, and being heard, at the close of the plaintiff's testimony Wilson & Ferguson, attorneys for the defendants, moved the Court to nonsuit the plaintiff, to which the Court replied, "I will overrule your motion as to the Southern," and turning to counsel for the plaintiff stated: "I do not think you have made out a case as to the North Carolina Railroad Company," whereupon counsel for the plaintiff stated: "We will take a nonsuit as to the North Carolina

Railroad Company," and at the request of counsel for the plaintiff the Court directed the following entry of record:

"Upon intimation of the Court that there was no case made out against the North Carolina Railroad Company the plaintiff takes a nonsuit as to the North Carolina Railroad Company."

Thereafter counsel representing the defendant Southern Railway Company moved the Court to remove the cause as to the remaining defendant, the Southern Railway Company, to the District
45 Court of the United States for the Western District of North Carolina at Greensboro, and later filed a second petition and bond by permission of the Court for such removal, which said bond is approved.

Upon the foregoing facts, and the testimony adduced upon the trial, the Court being of opinion that the plaintiff was not injured while engaged in interstate commerce, as contemplated by the act of Congress, in such cases made and provided:

It is ordered that the Superior Court proceed no further in this action and that same be removed to the District Court of the United States for the Western District of North Carolina at Greensboro.

R. B. PEEBLES,
Judge Presiding.

In pursuance to the foregoing order said case was transcribed March 13, 1913, and docketed in the District Court of the United States for the Western District of North Carolina at Greensboro, N. C., March 14, 1913.

At the September, 1913, term of the Guilford Superior Court the following proceedings *are* had:

W. L. LLOYD
v.
NORTH CAROLINA RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY.

This cause being called for trial, counsel representing the Southern Railway Company and counsel for the North Carolina Railroad Company objected to the trial of the same in the Superior Court and filed the following objections in writing:

(As set out in agreed case on appeal.)

In this case the following jury sworn and empaneled, to wit: David L. Pritchett, Q. Q. Boone, J. H. Kimbro, W. E. Schenck, C. H. Fields, H. B. Kirkman, N. S. Plummer, F. F. Bain, J. C. Shaw, A. L. Ozment, S. L. Phillips, W. E. Corum who in answer to the issues submitted to them, returned the following:

46 *Issues.*

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

1. Was the plaintiff injured by the negligence of the defendant, the Southern Railway Company, as alleged in the complaint?
Answer: "Yes."
2. Was the plaintiff at the time of receiving such injury engaged as an employee of the Southern Railway Company in interstate commerce?
Answer: "Yes."
3. Was the North Carolina Railroad Company at the time of the alleged injury of plaintiff engaged in interstate commerce?
Answer: "No."
4. What damage, if any, is plaintiff entitled to recover of the Southern Railway Company?
Answer: "$12,500."
5. What damage, if any, is plaintiff entitled to recover of the North Carolina Railroad Company?
Answer: "Nothing."

Judgment.

STATE OF NORTH CAROLINA,
Guilford County:

In the Superior Court.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

This cause coming on to be heard before the undersigned Judge and a jury at the September term, 1913, of the Superior Court of Guilford County, and the said jury having answered the issues submitted to them, as follows:
(As set out in the Record.)

It is therefore, ordered and adjudged, that the plaintiff
47 recover of the defendant, the Southern Railway Company the sum of Twelve Thousand Five Hundred Dollars ($12,500) and the cost of this action to be taxed by the Clerk.

THOMAS J. SHAW,
Judge Presiding.

Motion to set aside the verdict as being excessive. Motion overruled. Motion for new trial for errors to be assigned. Motion

denied. Defendant appeals to the Supreme Court. Notice given in open court. Notice waived. Appeal bond fixed at $35.00. Thirty days given to serve case on appeal and thirty days thereafter allowed plaintiff to serve counter case.

Agreed Case on Appeal.

NORTH CAROLINA,
Guilford County:

In the Supreme Court, Spring Term, 1914.

W. L. LLOYD
v.
SOUTHERN RAILROAD COMPANY and NORTH CAROLINA RAILROAD COMPANY.

This was a civil action tried before his Honor, T. J. Shaw, Judge, and a jury, at the September term, 1913, of the Superior Court of Guilford County.

The action was instituted by the plaintiff to recover for alleged personal injuries received while engaged in the employ of the defendant, the Southern Railway Company, as engineer, in 1911. The plaintiff alleging that at the time of his injury he was engaged as an employee of the Southern Railway Company for it in interstate commerce and was injured by an engine of the said railway company used in interstate commerce, and the plaintiff invoked for his protection the Federal Statutes in such cases made and provided.

At the return term for the summons issued in this case the defendant, Southern Railway Company, in apt time filed a pe-ition for removal accompanied by bond approved by the Court. The Court overruled the motion for removal and declined to enter judg-
48 ment removing the cause to the District Court of the United States for the Western District of North Carolina.

To the refusal of the Court to make the order of removal the defendant, the Southern Railway Company, excepted and noted its exceptions upon the record.

Thereafter the defendant, the Southern Railway Company, expressly reserving its exception and without waiving said exceptions theretofore noted to the refusal of the Court to remove the cause, answered the complaint of the plaintiff, and the cause came on for trial at the February term, 1913, of the Superior Court of Guilford County.

At the close of the plaintiff's testimony the Court intimated that there was no cause of action against the North Carolina Railroad Company, and the plaintiff, upon this intimation, submitted to a nonsuit as to that company.

Whereupon the Southern Railway Company immediately, through its counsel, filed its second petition for removal accompanied by bond approved by the Court as set out in the record, and the Court upon

argument of the motion to remove, granted same and an order of removal was made therein removing said cause to the District Court of the United States for the Western District of North Carolina, at Greensboro, N. C.

The plaintiff excepted to the order of removal of said cause and to nonsuit of the North Carolina Railroad Company and appealed from said order to the Supreme Court of North Carolina, and upon the hearing of said appeal in the said Supreme Court an opinion was rendered therein that said cause should not have been removed and remanding the same to the Superior Court for trial.

Upon the calling of said cause for trial again in the Superior Court the defendant, the Southern Railway Company, filed the following plea to the jurisdiction of said court:

49 *Plea to Jurisdiction.*

NORTH CAROLINA,
Guilford County:

In the Superior Court, September Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

Now comes the defendant, Southern Railway Company, and respectfully showeth to the Court that the above entitled cause was instituted originally by the plaintiff in the Superior Court of Guilford County, North Carolina.

That at the return term of said cause, to wit: the December term, 1911, of said court, and before the time for answering had expired, and within the time required by law, this defendant filed a petition and bond for removal of this cause to the District Court of the United States for the Western District of North Carolina with sufficient averments, as this defendant is advised and believes, to entitle it to an order of removal to said District Court of the United States.

That the Superior Court of Guilford County at said term made an order denying said petition and refusing to remove the cause.

That thereupon this defendant excepted to the order of said Superior Court and reserved its rights under said exception and thereafter filed its answer without waiving its exception or any of its rights thereunder.

That thereafter at February term, 1913, of said Superior Court the said cause came on for trial, and upon the trial this defendant renewed its petition and bond for removal and the Superior Court for said county held that said cause was removable and ordered that it be removed to the District Court of the United States for the Western District of North Carolina.

That immediately thereafter this defendant caused a transcript

of the record in said cause to be docketed in the District Court of the United States for the Western District of North Carolina.

50 That no motion has been made in the District Court of the United States for said District to remand said cause to the Superior Court of Guilford County and the order removing said cause has not been revoked, and no order remanding said cause has been made and the cause is now pending for trial in the District Court of the United States for the Western District of North Carolina.

Wherefore, this defendant respectfully represents that the Superior Court of Guilford County, North Carolina, is without jurisdiction to try this cause, or to take any proceedings therein, and hereby claims its right to have said cause heard in the District Court of the United States for the Western District of North Carolina.

WILSON & FERGUSON,
Attorneys for the Defendant, Southern Railway Co.

And the defendant, the North Carolina Railroad Company, filed the following plea:

Plea to Jurisdiction.

NORTH CAROLINA,
Guilford County:

In the Superior Court, September Term, 1913.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY and NORTH CAROLINA RAILROAD COMPANY.

Now comes the North Carolina Railroad Company and respectfully showeth to the Court that the above entitled cause was instituted originally by the plaintiff in the Superior Court of Guilford County, North Carolina.

That at the return term of said cause, to wit: the December Term, 1911, and before the time for answering had expired, and within the time required by law, one of the defendants, the Southern Railway Company, filed a petition and bond for removal of said cause to the District Court of the United States for the Western District of North Carolina upon the grounds of diverse citizenship, said petition

51 containing averments, as this defendant is advised and believes, sufficient to entitle it to an order of removal to the said District Court of the United States.

That the Superior Court of Guilford County at said term made an order denying said petition and refused to remove the cause.

That thereupon one of the defendants, the Southern Railway Company, excepted to the order of said Superior Court, reserving its rights under said exception, and thereafter this defendant filed its answer denying that it was a proper party to this action, and alleg-

ing that it had been fraudulently joined as a defendant in order to prevent removal of this cause to the District Court of the United States for the Western District of North Carolina.

That thereafter, at February term, 1913, at said Superior Court of Guilford County, this cause came on for trial, and upon said trial there was a nonsuit of the plaintiff's cause of action as to this defendant, and upon renewal of the petition and bond by the Southern Railway Company, the Superior Court of Guilford County held that the cause was removable and ordered that it be removed to the District Court of the United States for the Western District of North Carolina.

That thereafter, as this defendant is advised and believes, the Southern Railway Company, one of the defendants, caused a transcript of the record of said cause to be docketed in the District Court of the United States for the Western District of North Carolina, and said cause is there pending for trial.

That as this defendant is advised and believes, no order has been made by the District Court of the United States remanding said cause to said Superior Court, and no motion has been made that said cause be so remanded.

This defendant respectfully represents to the Court that the Superior Court of Guilford County is without jurisdiction to try this cause in that the said cause has been removed to the District
52 Court of the United States for the Western District of North Carolina and transcript of the record has been docketed in said District Court and said cause is there pending for trial, and this defendant respectfully protests against the trial of this cause in the Superior Court of Guilford County.

NORTH CAROLINA RAILROAD CO.,
By WILSON & FERGUSON, *Attorneys.*

His Honor, Judge Shaw, overruled the pleas made to the jurisdiction of the Superior Court to try the cause, and the objections made by counsel for the defendants to try the same, and ordered the trial to proceed.

To this order overruling their pleas to the jurisdiction and objection to trial, the defendants, each, through their counsel, excepted.

First exception.

The plaintiff, W. L. LLOYD, was introduced in his own behalf and testified as follows:

I am 48 years old; raised in Orange County; have been in the employ of the Southern Railway Company, first went in their employ in January, 1889, stayed with them until March, 1889; first engaged as a fireman up until 1893, and then as engineer until 1899. I left their employ; I was discharged and stayed away until February, 1902; I was discharged for overrunning a 30-minute late order, then went to work for the Seaboard Air Line on the Third Division between Monroe and Atlanta, as an engineer. Went back to the Southern in 1902, stayed until January, 1906, I then went down in Orange County on the farm, stayed there three years; moved to Burlington in 1909, engaged again with the Southern Railway

Company in June, 1910, as engineer. Continued in their service until January 12, 1911. In January, 1911, the last time I went back with them, I was hired as an engineer and assigned to the
53 division extending from Spencer, N. C., to Monroe, Va. I was engaged under that assignment at the time I was injured in 1911; I was on the extra list, but I might have been called to do passenger work; I didn't do any passenger work, but might have been called on to do it, I was doing freight work. My assignment ran from Spencer, N. C., to Monroe, Va.,—took me by Greensboro. The North Carolina Railroad extends from Goldsboro to Charlotte. The Southern uses that line of road from Greensboro to Salisbury. Spencer is about 2 miles from Salisbury, this side. I was injured while working for the Southern Railway Company in 1911, on January 12th. I was called, I suppose about 11 o'clock to take engine 579 out on a trial trip, at 11 o'clock in the morning. I was assigned to work on an engine, engine 579. I came to the engine after making the necessary preparations, and found the engine standing about 50 feet north of the cinder pit on a track which leads over the cinder pit and I proceeded to do the work on the right side of the engine, filled the grease cups, oiled the engine and so on on that side, and just at that time there was a machinist that was doing some work on the engine that moved the engine from there to the cinder pit and left the front trucks of the engine over the cinder pit. I rode down that far on the right hand side of the engine, dismounted and walked around the back of the tank to the left side of the engine and started to continue my examination, inspection and oiling, and just as I approached the back driver on the left side I saw fire falling through there freely from the grates to the ash pan; I thought perhaps that the grates were not all connected up and I walked up close to the engine; the space between the fire box and the ash pan, I suppose, was something like 2 inches, a little lower than my head. I stooped just about in this position (witness illustrates) in order to see there, get my eyes level—that I might see the bottom of the grate and just at that time when I was in that position this lever tripped and struck me and then I, of
54 course, did not realize anything from that time on; it knocked me senseless. I don't know when I first knew anything after that, it was some time in the hospital; I don't know just what time. The ash pan was arranged and the *the* lever operates in this way,—there was a lever about two feet long that set just back of the driver on the outside of the ash pan and frame of the engine, which pointed when the damper was closed in a horizontal direction toward the back of the tank. I suppose the way the engine was standing it was about two feet from the ground. This lever is operated—I mean this mechanism is operated by this lever and the connections has a center point, and in closing it, it brings this lug on the shaft, and then the front end of this rod is connected through the damper by nuts. At this position there is a strain on this rod and it takes force to put it by that point, and when once past the center the inclination of the force is to hold that lever closed and the damper shut. If you go to pull it open, it takes force to pull it by that position, and when by that position, all the force of this lever and shaft and damper helps

force the lever back and the damper open. The tightening of the nut on that rod that extends from the shaft to the damper gave this lever force—made it in the nature of a spring. You could put so much force that a man's strength would not operate it if you continued to tighten that nut, just running it up by moving the jamb nut of the damper and shortening the travel of the rod. You can run the nut the other way and take all the force away from it. When the nut and this lever rod is properly adjusted, it is sufficiently easy for a man to operate it safely; that has no danger when properly adjusted, as it remains closed when closed and open when open. Putting it on a center point it is not closed, neither is it open—the damper is shut but not locked, it is very easy to move either way, and should there be a jar or an explosion of the ash pan or anything which would alter the tension on this rod, it would go whatever direction it most inclined. When the fire falls through into the
55 ash pan, it increases the heat of the ash pan and expands it, and this rod is fastened to the frame at the back end of the ash pan or the front end, and, therefore, the motion of the ash pan as the ash pan lengthens, that increases the tension on the rod.

(The witness explains with relation to the engine where the rod is placed with the engine headed west.)

The rod is across underneath the car box just a few feet back from the ash pan, and this lever which I spoke of striking me connects with that shaft at the end and then pointed back toward the back of the engine. If I wished to attend to the ash pan with the lever, I would walk up to the side and reach down in a natural position by the side of the wheel; you would be on the outside of the wheel, the wheel between you and the engine; if you wanted to open it, pull it up. When I was hurt I was looking underneath the fire box to see if the grates were connected or not; my head was right in the course of that lever; that is the position I had to get in to see the ash pan to see whether it was hot or not. That was about the only place I could see into that. The lever hit me right directly between the eyes. This engine was an engine of the Southern Railway Company; it had been engaged in through freight service from Spencer, N. C., to Monroe, Va. It has been engaged in the same service since. The track that I spoke of the engine being on at the time I was hurt was the side track used in connection with the North Carolina Railroad. It is connected with the North Carolina Railroad at both ends. An engine on that side track can not get to Salisbury going the other way, or to Lexington coming this way, or on any line of road owned by the Southern Railway Company except first getting on the North Carolina Railroad. The engine at the time I was injured was one hundred and fifty or two hundred yards from the main track of the North Carolina Railroad. The lever was made out of iron, it was a little bit tapering; I think at the large end where it connects to the shaft it was something like one and one-half inches, maybe
56 three-quarters, wide, and maybe two inches; about two feet long, not quite so wide, but the same thickness at the tapering end.

(Witness here describes the extent of his injury, the treatment

he received for same, and the effect upon him physically and mentally.)

Cross-examination.

The North Carolina Railroad extends from Goldsboro to Charlotte; both of these points are within the State of North Carolina. The North Carolina Railroad does not run out of the State of North Carolina. The Southern Railway Company employed me; the North Carolina Railroad Company had nothing to do with my employment; I did not work for them in any way, not directly I did not; I was engaged by the Southern and paid by the Southern. The North Carolina Railroad did not operate any trains, the trains were operated under a lease by the Southern; the North Carolina Railroad was not engaged in carrying anything over the road at all; the running of the road was conducted entirely by the Southern Railway Company. The agents and employees of the road were employed by the Southern.

I began railroading, I think it was, in 1889, and terminated in 1911, when I was injured; of course I have been off, some time, out of that.

(Witness is here permitted to be examined by counsel for the plaintiff on a subject which was omitted in the direct examination.)

I received for services over this road $9.18 a trip, I think it is; I was paid by the mile; it is 169 miles from Spencer, N. C., to Monroe, Va.; I think I was paid 5 4-100 cents for the larger engines per mile. During my last employment with the Southern, from Spencer, N. C., to Monroe, Va., I operated an engine from some time in June until January, not regular, however, as I was an "extra" man and did not make runs every day, but just took such runs as showed up in relief work with other men on that
57 route. I had made $52 during the month that I was hurt up to the 12th of the month. I had run from Spencer to Monroe all except one trip, I would not be positive about that: I know I went to Selma one trip; I know one or two trips I made to Monroe.

(Cross-examination here continued:)

I was engaged in railroad work from January, 1906, to June, 1910. With the exception of four and one-half years, I was engaged in railroad work practically from 1889 to 1911. During that time I was first engaged as fireman and then as engineer; I was perfectly familiar with the operation of an engine and the parts of an engine. The regular duty of an engineer every trip is to inspect and examine his engine, to see if it is in proper condition; I did that every trip. It is the duty of an engineer to inspect and see that his engine is in proper condition. I suppose I say in my complaint that it was my duty on this occasion to ascertain whether or not this engine, 579, was in a serviceable condition; that, I think, is the language of my complaint—that covers it, anyway; that was my duty. When I was injured I was looking in up between the ash

pan and firebox to ascertain if the grates were intact. I swore in my complaint "that while stooping over and looking under the engine to ascertain if the ash pan and the other equipment were in proper condition, a lever about two feet long, which was located at the rear of the driving wheel and on the lower side of the engine, used for the purpose of operating the damper to the ash pan." I reckon I did. If it is there let it remain; I don't care to read it if it is there.

Witness is asked to read and state to his Honor and the jury if the quotation is not just exactly word for word as he has it in the complaint. Yes, sir, that is all right, so far as I know.

I was perfectly familiar with the operation of engines and the inspection of the same that did not have any changes or new equipment that I was not familiar with. A part of my duty on
58 that day would have been to inspect and examine this engine before returning it to the shops. I had to make an inspection before carrying it out, to see that it was in condition to carry out; that was the purpose of the trip, to see if it was in proper condition and make it so. The very purpose of that trip was to make the inspection, so that I might ascertain whether it was in proper condition. That was the purpose of putting me in charge of that engine. In my previous railroad experience there never had been any of those damper levers of that mechanism used on an engine; I had been operating engines with this damper since I came back to the railroad from June until January; it was not in my line of business operating that part of it. I had been operating from June until January; I had been operating engines with this very equipment from June continually to January, about six months. The old way of cleaning the ash pan was by going underneath and raking it out with a pole or rake or something else. With the new construction you can not clean it out without going under the engine any better than you could with the old one if you didn't have any better arrangement. All this is to open and close the damper; you got it without the lever on the old arrangement; this arrangement did not aid in doing that. They changed the ash pan from the old arrangement to an arrangement whereby it could be cleaned out without going underneath; this part of it was not made to comply with the law. I don't mean that this was in violation of the law; I mean that this has nothing to do with the compliance of the law toward cleaning the ash pan. The proper way to handle the lever of an ash pan and the safe way is to go to the side of the engine, on the left side; go to the side of the engine with your face the way the engine was fronting, and stoop down and catch hold of the lever and pull it; that would be the natural way and that would be the proper way. When you pull the lever up in that way, your body would go up with it. I can't say that there was no danger in handling these that way to the person operating it; there is
59 danger to them any way you handle it; there is danger to the person operating it no matter how you handle it, if you take one improperly adjusted; they are universally known to be dangerous if they are not properly adjusted; anybody can tell you that,

fireman or anybody. If properly adjusted you can handle them any way you want to and not hurt you. I told his Honor and the jury only a short time ago that the proper way was to stand with your face toward the front of the engine and stoop down and pull and bring your body up with the lever; that would be the natural way. I never saw any directions as to how to handle it; I never handled one in my life until that time; I have seen the firemen handle it. I did not take hold of it; I may have touched it with my leg; I didn't touch it with my hand to my knowledge. I didn't stoop down and get hold of it at all; I didn't intend to get hold of it; I did not, so far as I was conscious of; I did not go there with any purpose to handle it. To the best of my knowledge I never touched it, never put my hand on it; I may have touched it with my leg; I saw the lever that day before I was injured just like I saw the balance of the engine, as a part of the engine before me, that is all; I didn't make any examination of it. I can't say from what I saw that the lever was not properly adjusted; I can't say from what I saw whether the lever was properly or improperly adjusted; I had not been on that side of the engine, I don't suppose, more than five seconds when I received the blow. I knew from reputation beforehand if the lever was not properly adjusted that it was dangerous; I had never handled one in my life. I had handled engines of that character with levers from June until January; I know I had some engines equipped that way; I don't know whether all of them were, because it was not in my line of business to have anything to do with the damper; that came in the fireman's line and hostler's; I never had to clean fire or assist in doing it; it was my duty to inspect the engine, the machinery of it. It was my duty, and I say in my complaint, to ascertain whether or not that engine was in serv-
60 iceable condition to go out on that trip; that was the very purpose of taking the engine out at all, was to take it out to see whether it was in serviceable condition. Anything that would be wrong or unserviceable, of course, I would be expected to report, and if I had not gotten hurt with that damper and had investigated it, it would have been my duty to report it to the foreman to be properly adjusted, which I would have done if I had not been hurt.

I received the engine, not from the roundhouse, but from the track where they had placed it; I was going out with Mr. Heilig, road foreman of engineers, that was the instructions that I had; I did not know how far I was going; I don't know whether I was going further than Salisbury or not; I was entirely under the jurisdiction of Mr. Heilig, the road foreman of engineers; I have never been west of Salisbury, never saw a foot of the track in my life west of Salisbury; of course, I would not have been expected to take an engine over there myself; Mr. Heilig, the road foreman of engines, was going on another engine with me. We were going to carry out two engines to see if they were in serviceable condition, and to inspect them to see what condition they were in, and to make a report if they were not in good condition. This engine had been in the Spencer shops for repairs, and I knew it had been there; the Spencer shops are located on the sidetrack of the North Carolina

Railroad, anywhere from one hundred and fifty to two hundred yards from the North Carolina Railroad's main line; they cover quite a space there; it is not within one hundred feet of the main line. I don't know how many sidetracks are there on the yards at Spencer; they run up into the hundreds, about a hundred, I suppose. I could not say how many of these tracks are where the repair work is done in the shops proper, a large part of them, though. It is not just one sidetrack that the shops are located on, a great many, all connected to a lead that extends back to the North Carolina Railroad at both ends. A great many of these sidetracks
61 are north of this lead, and they run into the lead; the ends of the lead connect to the North Carolina Railroad. One at the north end of the yard near the station, probably four hundred yards from the shops; the other end of the lead runs up near the Vance mill; the Vance mill is about one mile, I suppose, from the shops. Until it gets up very close to where it makes connection it does not touch the North Carolina railroad track at all; I mean you can not get out there at all without going on the North Carolina Railroad; it only -onnects at the ends of a stretch of two miles, I reckon it is very nearly two miles. The track is a kinder of elbow, the outside track is not on the North Carolina right of way; the shops and all mostly, of course, are away from the North Carolina Railroad. This lead that I spoke of is used in taking trains and engines from all the shops coming from runs and going out for runs. It is used in going to the shops, going to and from the roundhouse. In the shops they overhaul and erect engines, and the roundhouse is a storage place for the engines not operating on the roads; both of them located there at that place; both near each other, about fifty yards apart. It is a right large plant; they don't make any engines, they overhaul and repair and do work of that kind; do not build any engines.

When I went to carry out that engine that morning, I had no cars attached to it; I was not carrying any freight with it at all, there was nothing hitched to the engine at all; no passenger cars and no freight cars or anything. I never moved the engine. It was not in contemplation that I should carry out any freight, any passengers or any cars. I don't know from any inspection I made or anything I saw why the lever struck me at all. I testified on former trial that I did not recollect anything after I was struck with the lever. I might have stooped over before I was struck at some other place. I remember all up to the time I was stricken. I testified before that I went up to that engine and stooped, and that I did not recollect anything that happened after I stooped over; that is what I testified if it refers to the time I stooped to look into the
62 firebox, that is correct, looked underneath the grates.

(Witness is asked if, upon a former trial, the following questions were not asked and the answers given:

"Q. Now, Mr. Lloyd, you say when that lever struck you, you were unconscious afterwards?

"A. Yes, sir.

"Q. Mr. Lloyd, I ask you if, after that, you haven't stated to

several people that you knew nothing about whether you took hold of the lever, or how the accident happened?

"A. I say I didn't take hold of it as long as I was conscious; I had no intention of taking hold of it."

I never knew anything after I was struck. There was a time when I didn't have any recollection; I don't recollect now being struck, because I was knocked unconscious; I have no recollection of anything that took place after that time, up until I was struck I was *un*conscious, and after that time I was unconscious. I don't recollect being struck; I don't recollect being struck at all. I don't know only from the connecting circumstances in the case what struck me; I know the position I was in and that my head was in the course of this lever; there was nothing else on that side of the engine with any danger at all about it. I don't know of my own knowledge or from what I saw, or what I was conscious of that the lever struck me; I don't know anything of my own knowledge after I was struck. I will just have to be plain with you in that.

(The ash pan and lever brought into court.)

That is what I call the ash pan damper and lever. I could not tell you whether that was actually on that engine at that time or not; all made on the same pattern, I can not tell one from the other, no mark or anything on it.

(Witness indicates different parts of the model.)

The way to operate it, if you push it down past the center it closes the damper, and when you pull it up past the center it opens it. When it is open you wash the ashes out through the ash pan and down on to the ground. It is located just underneath the
63 firebox; the firebox is just back of the back driving wheel underneath the cab and extends up above and past the back driver.

(Witness explains to the jury.)

(Witness is handed picture of engine 579 and asked if they are correct pictures of engine 579 that he was operating.) He says they are pictures of 579, but he can not say they are correct, but so far as he knows they are.

(Witness is cross-examined as to his injuries and the extent of the same, where he was cared for, and what doctors attended him.)

I told Mr. Brooks that I had made fifty-two dollars up to the 12th of the month before I was injured. I did not make very much the month before that; I had not been staying at Spencer, was living here at Greensboro; I just stayed at home, not much work for an extra man; I did not stay in Spencer. I made fifty-two dollars to the 10th of January; don't know how much I made in December. I never made over fifty dollars any month from the time I was employed up to that month. I tried to leave the impression upon the jury that I made nine dollars and something a trip instead of telling them what I made per month, in order that I might show that I

got more then for one day's work than I do now for five. I never in any one of the six months I worked made more than fifty dollars, except this month up to the 12th. The reason why I did not, I did not work. I was asked the question on the former trial:

"Q. What is the last distinct recollection you have?"

And I answered:

"A. Seeing the fire falling through from the grates into the ash pan and going there for the purpose of finding whether or not those grates were intact or whether they were disconnected, or how they were."

That is correct, that is the last recollection I had. I don't know of anything after the accident; I didn't know anything until I found myself in the hospital; that is what I said. That was my answer then, and that is my answer now.

64 Redirect examination by Mr. BROOKS:

The sidetracks which I speak of where I was injured as being part of the line running out from the North Carolina Railroad are used to store cars on, some used to do repair work on, in fact, used for any and all purposes, broken down cars that they turn over from the north going south, and from the south going north, pulled in and left there for the train and engine, tender and engine to come out and couple up. Coming from Monroe, Va., Selma, N. C., and Norfolk, Va., they come from Norfolk and Selma; they come over the western roads south over the road to Atlanta, and over the road to Columbia. They come and go from any and all places. The cars are adjusted there from outside of the State as well as from inside. The machine in court is not the machine that was in court at the last trial; it is not adjusted exactly like that machine.

(Witness goes down off the stand and illustrates to the jury how the machine is operated and how he was injured.)

That is the locked position; the purpose of this lever is to hold this damper shut so as to prevent the fire and cinders from wasting out; that is shut, locked now; you can't open it. That is what they call the proper adjustment of that lever; you can hold your head down here and drop it and it won't hurt you, no danger in one properly adjusted. This same machine can be fixed so as to give that lever more momentum by tightening up these nuts on the front of this rod; the further out you run those nuts the greater is the force when you bring this rod down. The tighter you screw up these screws the more momentum it gives the lever when it comes back; it forces the strain on the damper and this shaft shortens the rod between the two. The machine is now on the center position; you notice the slightest touch will move it. The pressure on the rod is on the center. The pressure is increased or diminished according to the way in which the nuts are tightened on the end of that rod. If you touch it lightly, it will go down; if you
65 touch it lightly underneath, it will come up. If properly adjusted it did not have enough force to hit you, no danger;

when it is put in adjustment, as it is now, any one can hold their head there and no danger.

(Witness illustrates by model before the jury where the conders were falling from that attracted his attention.)

I was standing on the ground and I stooped about this way (indicating) in order that I might see the bottom of the ash pan to see about the grates, see if they were connected up, as some of the workmen in putting them in failed to connect the grates. It may have been cocked and allowed the fire to fall through; that is what my intention was, to see about those grates.

Recross-examination:

I do not think that is the machine that was in here last court, because it is a different model, different pattern, and differently constructed. It may be the same damper and the same mechanism, but it don't look like the same frame. I am talking about the construction of it and the way it is arranged. It may be the exact frame that Mr. Smith and others tried to bring through that door and on account of the narrowness of the door had to saw off this part of the frame, but it does not have the same appearance; it is not operated like it was before. I said I didn't think it was the same machine, to the best of my knowledge, it does not work like the other; the bearings of it are different. I can take it and in fifteen minutes it will be altogether a different machine. I was not just speaking about the adjustment, I was speaking about the whole business, was speaking about the operation of the thing, that is what I had reference to. I was not talking about the machine, it may be the same parts. You can adjust the machine; I showed the jury not five minutes ago how to operate it. Anybody can adjust it, tighten it. I didn't adjust it on the former trial. I asked for a monkey wrench with which to make the adjustment but did not get it.

66 JOHN PERRY, witness for the plaintiff, being first duly sworn, testified as follows:

My name is John Perry: I was working for the Southern Railway Company in January, 1911, at Spencer. I was working there at the time Mr. Lloyd was hurt; I was hostler helper, helping to clean up the engines there over the cinder pit, raking ash pans, and just anything that come to hand down in the pit. I was at work there the day at this point where this engine Mr. Lloyd was hurt on was, I saw him when he was hurt. He was hurt by the ash pan lever, that lever there; it flew up and struck him; when it struck him it killed him; he didn't have hold of it, just knocked him back off from the engine, knocked him plumb back away from it, knocked him down. I didn't see him touch the lever, didn't see him touch it nary time. I said before that I didn't know whether he touched it or not; I don't know now whether he touched it or not; it flew up and struck him, is what I said. I didn't see him touch it. If he touched it, I could have seen him; I was the only one seen him

when he got hurt. I don't know whether he touched it or not. I was standing right at the end of the pit. (Witness illustrates where he was standing.) I don't know whether he touched it. If he touched it, I would have seen from where I was standing. I say I don't know whether he touched it, because I didn't see him touch it; he could have touched it and I not seen him, but I didn't see him touch it. I could have seen him, I guess, the way he was standing to me; he was standing sidewise. He stooped up under the engine. I didn't see him reach up under the engine, he was stooping under there; he had his oil can, he reached up under there and he had a wrench in his hand; he went up under there, I don't know whether he reached or what he was doing. He went up under there, he was reaching up under there with his oil can; I don't know whether he was oiling up or what; he had his oil can and monkey-wrench in his hand. The firemen filled up the oil cups on the right-hand side; I was on the lefthand side of the engine,
67 headed south; he was on the lefthand side where I was. I don't know whether he was going around the engine and inspecting it; don't know whether he was looking to see if it was all in good fix and good order; I didn't have no talk with him at all. I don't know whether he touched it and made it fly up, or whether it flew up without his touching it; all I know it flew up; I seen him lying there, I seen it when it struck him; I was the only one seen him. He did not catch hold of it. I don't know whether he caught hold of it or not; I didn't see him catch hold of it.

No, sir, it won't come loose unless you pull it; I have seen them a heap; I run across the track and mashed them down a heap of times. Yes, sir, I rake ash pans. I have never seen one pull up itself without somebody taking hold of it; no, sir, I never seen nary one work all by itself; you have got to touch it or do something to it before it comes up. You have got to pull on it before you can bring it up; if it is fastened down like this you have got to take and pull it up, have to take a bar and prize them when it first comes out of the shop; they take a bar and raise it up. When it struck it was open, after it done flew up. I don't know how it was before it flew up at all, I don't know anything about how it was; I don't know what caused it to fly up at all. From what I saw, I don't know what caused it to fly up.

Prof. W. A. FLICK, witness for the plaintiff, being first duly sworn, testified as to the condition of the plaintiff's health before and after the injury, and as to the extent of his injury and suffering.

J. D. DORSETT, witness for the plaintiff, being first duly sworn, testified as to the character of John Perry; that the same was good for truth and honesty; and as to the good character of the plaintiff.

68 The plaintiff next introduced portion of section five of the complaint, as follows:

"That the defendant, Southern Railway, as such lessee, by and

with the consent of the North Carolina Railroad Company, uses and controls that part of the North Carolina Railroad Company's tracks from Greensboro through Spencer to Salisbury, North Carolina, as a part of its trunk line from north to south, along and over which it was, and is, engaged by and with the consent of the North Carolina Railroad Company in transporting interstate commerce from Virginia and all points north to South Carolina, Georgia, and other points south."

And the defendant's answer to that part of section five:

"That the allegations of the fifth article of the complaint are admitted."

This portion of the complaint and answer being admitted by the Court against the Southern Railway Company and not against the North Carolina Railroad Company.

The plaintiff introduced paragraph five of the answer of the defendant, the North Carolina Railroad Company, as follows:

"In answer to the allegations of the fifth article of the complaint, it is denied that the Southern Railway Company is jointly liable with the North Carolina Railroad Company for all torts and injuries committed on said line of road, the Southern Railway Company being liable only for such torts or injuries as may be caused by the fault or negligence of the Southern Railway Company."

The plaintiff offered section six of the answer of the Southern Railway Company, as follows:

"That the allegations of the sixth article of the complaint are not true as therein stated, and are denied.

"It is admitted that the plaintiff, W. L. Lloyd, was employed on the 12th day of January, 1911, and for some time prior thereto, as an extra engineer, and that he had performed the duties of engineer upon trains running over and along said line of railway
69 from Spencer, N. C., to Monroe, Va., and had engaged in hauling interstate traffic; and the defendant further avers that the said W. L. Lloyd had been employed by the defendant as engineer upon trains running wholly within the State of North Carolina and engaged in hauling intrastate traffic, and the defendant denies that the said W. L. Lloyd, on the 12th day of January, 1911, was engaged in interstate traffic or commerce of any kind."

Plaintiff rests.

Counsel for the defendant, the Southern Railway Company, at the close of plaintiff's testimony, demurred to the evidence and moved the Court to nonsuit the plaintiff under the Hinsdale Act. Motion overruled. Exception by the Southern Railway Company. Second exception.

The defendant introduced testimony as follows:

COL. JNO. S. HENDERSON, a witness for the defendant, being first duly sworn, testified as follows:

I live in Salisbury; have lived there since 1846; sold the property to the Southern Railway Company.

(Certified copy of deed of property placed in evidence and exhibited to witness.)

I sold this property to the Southern Railway Company; it is used by the Southern Railway Company for their shops and for their sidetracks and for their coal at Spencer, N. C.; I heard nearly all of the testimony of the plaintiff in this case; I heard him describe where the engine was located at the time of his injury; that place is on this property that I sold to the Southern Railway Company; it is not on the right of way of the North Carolina Railroad Company; it is several hundred feet, I think, away from the right of way.

Colonel Henderson further testified as to the character of certain witnesses for the defendant.

70 Cross-examination:

The North Carolina Railroad extends from Goldsboro to Charlotte; these sidetracks which I speak of were situated at a place known as Spencer, about two miles from Salisbury; the Southern Railway Company operates the North Carolina Railroad under a lease; they use those yards to store freight cars, passenger cars, and engines, and handle stuff for the North Carolina Railroad Company over their division; it is a great stopping place; I don't know how much is put off there, every train stops there; they shift their cars, engines, and passenger coaches on these sidetracks, and use it as a shifting and handling point in that method on the North Carolina system.

Redirect examination:

The Southern uses it for all its business, not only over the North Carolina Railroad, but over the western road and other roads coming in there; there are other roads besides the North Carolina Railroad coming into Salisbury; the Yadkin road comes in there, and the Western North Carolina Railroad comes in there. The North Carolina Railroad Company does not operate any cars or trains at all; only the Southern. The shops down there are used as repair shops, then it is a place where all of the engines and all of the cars of all kinds stop there every now and then for repairs and for unloading and rearranging and everything of that sort; it is not simply as to the North Carolina Railroad Company, it is as to the whole system, it is as to every car that belongs to the Southern Railway that passes there, whether it belongs to the North Carolina Railroad or not; I mean whether they are operated on the North Carolina Railroad or not.

Recross-examination:

They have to be operated on the North Carolina Railroad Company to get there; I don't know anything about how much in
71 proportion the North Carolina Railroad business is as to the general business of the Southern Railway Company; I know there is a vast quantity of business between Salisbury and Greensboro; I know there is an enormous volume, I can not remember the proportion. This business is shifted and handled about over all these yards.

J. M. FRICK, witness for the defendant, being first duly sworn, testified as follows:

I occupy a position with the Southern Railway Company, boiler maker or handy man; I occupied the same position at the time of the injury to Mr. Lloyd at Spencer; I worked at the roundhouse then, I am working in the back shop now; I remember the occasion when Mr. Lloyd was injured. The engine, No. 579, came in and she was in need of repairs, came in for repairs to the roundhouse, and I was there to look out and see if there was anything wrong on the pan and to repair it; of course it was burnt and warped a little, the back end of the ashpan and damper, and I cut it loose and taken it up in the shop and straightened it and brought it back and bolted it back up as it should be to its position; bolted it and adjusted it; bolted the damper and adjusted the rod. That is all I done to it. When I got through with it, it was in good condition, first-class condition, just as good as I or any other man could put it in. I operated it; it operated all right, first-class condition. I can not say where the engine went to from the shop, because when I got that job done I went over to another job; I don't know where it went; they taken it out somewhere, but I don't know when nor where it went; to the best of my recollection, I got done with it about 9 o'clock on the same day that Mr. Lloyd got hurt; I think he got hurt some time after 11 o'clock; I am not sure, it was before noon, I don't know exactly what time, but it was before noon.

(Witness is shown a model of the ash pan, damper and lever in the court room and asked if it is the same character of lever
72 and ash pan that was put on that engine, and he says:) One just like it. I could not say it is the same one, one just precisely like it.

(Witness goes off the stand and illustrates to the jury by the model how he fixed the machine.)

You can operate the lever in either way, facing the front of the engine or facing the rear of it (illustrating); the proper way, if facing the head of the engine, would be to stand with your side to the engine and operate it with your right hand; to turn the other way to operate it with the left side to the engine and operate it with your left hand with your head out of danger; your body would come up with the lever. If you were standing at right angles and undertook to pull it up with your hand, it is liable to slip out of your hands.

Cross-examination:

The ash pan on this engine was out of fix when it came in; I went to work on it at 7 o'clock and got through some time after 8; the engine came into the shop to fix the ash pan and arrangements that was out of fix; not especially for that, but came in for all repairs it needed; that is all I done to it. The ash pan was burnt and warped so that it threw the fire out so that the fire would lose out on the track, and I put it in good condition; it was down in the pit; I could not get in there to straighten it, and had to cut the bolts in it. We had to cut these out to straighten it; I cut them all off; I don't

remember whether I put in a new rod or not. I won't say positively if I did, it was one just like the one that came out; I put in new nuts; the nuts were not burnt, the damper was what was burnt. No fire can get to the rods when it is closed; the fire is on the inside; the fire can not get to the rod; I put in new nuts because the threads sometimes jambs them up too tight, likely to get licks, likely to get out of fix; I can tighten up that rod with these nuts and throw on the tention on the lever; I can take a wrench and with this rod tighten it up so that you can hardly turn that lever; I can fix it so you can't turn it; you can fix it so tight if you lift it it will fly up with
73 great momentum, sufficient to break a man's skull; it was fixed that day a little fraction tighter than it is now, not very much; you can not get it exactly like I had it on the engine, because the wood will give; it is nearly so. The difference is the wood will give and the engine is iron and there is no give to it; fixed like I fixed it, there wasn't any danger in it if you worked it right. I had a monkeywrench, I believe, when I fixed it; we have to have a monkeywrench here now to fix it like I had it then; when I fixed it, it had very little more momentum than it has right now. I couldn't tell you how many engines I worked on that day, a good many; they are coming in and going out all the time, I couldn't give any definite answer as to that; I suppose forty or fifty come in a day; that is just a guess. Am fixing similar machines to this frequently, adjusting ash pans frequently; don't remember what engine I fixed the day before this, and don't remember what one I fixed the day after. I think I fixed No. 1200 just after I fixed this one, am not positive. It has been two years since this happened, something like that; yes, sir, I screwed or jambed the last nut on; I went on to the next engine; there wasn't any fire in the engine, it was being fired up when I left. I didn't see the engine again until that afternoon; saw it at the place Mr. Lloyd got hurt; it had not been heated up so as to affect the tension at that time; after the ash pan is full of clinkers, it gets heated up; I saw this engine some time right after 1 o'clock; I went to work at 1 o'clock and it was just a few minutes after that when I first heard of the injury, when I got back from dinner. It is adjusted now about like I adjusted it that day; probably a little tighter; it was a little tighter then; adjusted just as it is now, it will stand half adjusted, but will not go either way unless something hits it; that one is adjusted that way now; it is the first one I ever seen stand on the center; that is fixed so now that with a little touch it will fly up, and press it it will go down; the other one I fixed is just exactly like this one; I am not trying to draw any distinction between this one and the one I fixed. The one I fixed does
74 just like this one, a similar machine. When I finished the engine, I turned it over so the men could fire it up. I don't know who fired it or looked after it, I don't know who; after that I went to another job; my title is boiler maker, handy man.

Redirect examination:

You can run these two back nuts back and run the two forward nuts closer to them, and it will shorten the rod; it makes it tighter

to push the rod past the center; of course, when it gets up to the center and it passes the center it has greater force; the one that I adjusted that day was not adjusted in that way; I never adjusted any since I worked on them that way, thought more of my fellow man than that. I would not have remembered this engine if it had not have been for Mr. Lloyd getting hurt; I finished this one that morning some time and found it out at noon after I got back from dinner, and I went straight down there to see how it was and its condition was just like I left it; just exactly like I had left it that morning, fixed just like it was; it was not working any tighter or looser than when I left it that morning. It was adjusted just exactly like all of them are; I adjusted them pretty near the same; just locked tight enough to hold it down so that nothing would jar it up. Nothing there to knock unless you caught hold; we adjust them tight enough so that if they are running over the road the jar would not knock them loose and lose the fire, and that is the way this one was fixed that morning. It was adjusted just exactly like all; that is the way this one was fixed that morning; I didn't leave it on the center, I could not leave it on the center; if it could be left on the center, I never could do it; probably somebody else could, but I never could. The reason it can not be left on the center is when it gets right to the center that rod is bent right here; and it is just like a pin point, either got to go shut or go open. We could not move an engine from the roundhouse onto the track adjusted on the center.

75 Recross-examination:

I said I had never seen one fixed that way, the model in the court room is sitting there now fixed that way, no one has touched it; touch it a little and it would fly up; touch it with your knee it would fly up; I work for the Southern Railway Company.

H. S. WILLIAMS, witness for the defendant, being first duly sworn, testifies as follows:

I work for the Southern Railway Company; am fireman; I held this position on the day Mr. Lloyd was injured; I was called as fireman for engine 579, that is the same one that Mr. Lloyd was handling at the time of his injury. I was called about 9:15 to go out on this engine, 579, and I went over to the roundhouse and found this engine, 579, standing on one of those tracks between the house and the cinder pit; I went down and went to work, getting the engine ready, and Mr. Lloyd came directly to the engine some time after I got to the engine; I don't just remember how long it was from the time I got to the engine until he came. He came over to the engine and got his oil can and then he came and got up on the engine where we were at work; there was some gentleman doing some pipe work up in the cab, putting on a lubricator, and at the time they moved the engine from where it was standing down near the cinder pit and then Mr. Lloyd got down and oiled around the engine and come around and I still stood up in the cab doing some work, getting my fire ready and getting everything in shape. After I got through

with my work up in the cab, I came around and down on the ground and Mr. Lloyd had come on around and he came on up and oiled his side rods on the engine, main connections, and he just left and walked right on up towards where I was and stooped down and reached and got hold of the ash pan lever and pulled up on it. He was standing straight, at right angles with the engine, with his face toward the engine; caught hold with one hand first and
76 pulled, and he failed to open it, and then he caught hold with both hands, to the best of my knowledge. I was standing behind him; I did not see the lever hit him; he raised it like that (illustrating), and fell right back, and his head fell right in between two cross-ties on the opposite side of the track, just this way from the engine (illustrating). I went for some help and a gentleman came around there and took Mr. Lloyd and I went over then to the roundhouse and had a doctor phoned for. I did not see Mr. Lloyd after I went to the roundhouse, because I think the doctor got a message and come on back and he had revived and they carried him on, took him to the hospital and never seen him any more. Mr. Fuller and Mr. Neighbors came down to the engine shortly after the injury to Mr. Lloyd and examined it; not very long after, I suppose between fifteen and twenty minutes, could not have been more than ten minutes; I saw it operated, it operated all right, first class.

Cross-examination:

Mr. Lloyd came around to the engine and reached down and took hold with one hand, as I have described; tried to pull it up and it would not come, and then he took hold with both hands; when he caught hold of it with both hands and pulled, it flew up and I saw him fall back; it knocked him plum- his length, plum- back further than his feet were; he was unconscious, I thought he was dead at the time; there was blood left on the corner of the lever. I am in the employment of the Southern Railway; I went to Mr. Brooks's office about a year ago with Mr. Lloyd.

(Witness is handed a statement and asked to look at it; says he signed it.)

At the time I made this statement I was ignorant of the conditions, I mean I was ignorant *to* the statement I had made out prior to this; it had not been in my mind at all because I did not know the thing was in the hands of the law; I made it out to the best of my knowledge at the time.

77 (Witness reads statement, which is as follows:)

"I was fireman on the engine upon which Mr. Lloyd was engineer on the yards at Spencer preparatory to making a trial trip. I came down off of the engine just as Engineer Lloyd came around on the side of the same with an oil can in one hand. I saw him stoop near the ash pan by the side of the engine, looked under the engine and started as though to reach his hand under same when the lever to the ash pan tripped, flew up and struck him in the head, knocking him senseless. I can not say positively whether his hand actually

touched the lever before it tripped or not, but I know he did not apply any force to it with his hand, and the hand was merely extended in front of him. Immediately after he was hurt, I looked at the lever and ash pan and found that on account of a connecting rod which acted as a spring to said lever that it had been too tightly bolted and screwed up so as to give this lever an unnecessary and dangerous force. I have worked on other ash pans and levers on Southern Railway engines, and the usual and proper condition for them to be in is to be sufficiently strong to hold the ash pan together, and to work back and forth by hand without any jerk or force. Before the engine was moved, and a short while after the injury, Fuller, the shop superintendent, and Neighbors, the roundhouse foreman, came up and examined the ash pan and lever. One said that the cause of the accident was that the nuts on the rod had been screwed up too tight, giving the lever too much force, and that it ought not to have been so tightly drawn up, to which the other agreed.

"Fuller is the shop superintendent and had charge of overhauling this engine and putting the same out. Neighbors was general foreman of the roundhouse.

"This the 8th day of February, 1912.

(Signed) H. S. WILLIAMS."

I don't remember that I said at the last court when I came into Mr. Brooks' office that I was sorry, but could not make this statement on the trial if I was put on as a witness; I don't re-
78 member that I said that I was sorry but that I was at work for the Southern Railway Company and could not afford to swear to that statement; I didn't say in the presence of Mr. Hall and Mr. Lloyd that I was subpœnaed by the railway and had worked for them and could not afford to make any statement, and that I was afraid I would lose my job; I don't remember that I was confronted with this statement and that I hung my head for at least twenty minutes and finally said I could not make the statement.

Redirect examination:

I made a statement shortly after this accident happened, and in that statement I stated truly what did happen.

(Witness reads statement and says it is correct; says he does not remember the date of the statement.)

I made this statement something like a week or two after the accident; this was before I made any statement to Mr. Brooks.

(The statement was introduced, and is as follows:)

"SPENCER, N. C., January 13, 1911.

"My name is H. S. Williams, age 24, married, residence East Spencer, N. C. Have been working for the Southern Railroad Company at Spencer, N. C., about one week as fireman.

"On January 12, 1911, at about 9 a. m., I was called to go out on engine 579, on trial trip. The engine had just been turned out of

the shop. I got to the roundhouse about 9:15 a. m., went on down to the engine about half way from the roundhouse and the cinder pit. There — three white men doing pipe work, putting on lubricator, etc.; there were some grease wipers cleaning the engine also. I do not know the names of any of them; I went to work getting the engine ready to go out. The engineer came to the engine, I think, about 9:40 or 10 a. m. He looked around his engine, oiled her up, etc. We got up on the engine and another man moved the
79 engine from where it was standing down near the cinder pit. I do not know this man's name. He got down off the engine after getting down near the cinder pit. Mr. Lloyd, the engineer, got down off the engine and was looking around the engine, I suppose. I stayed in the cab, was wiping off the boiler head and cleaning up in the cab. When I finished I got down off the engine on lefthand side, thinking there might be some work the engineer wanted me to do down there. When I got down on the ground, Mr. Lloyd came around in front of the engine and came on up to the ash pan. He took hold of the lever to the ash pan opener with his right hand and began shaking it. I think he did it to see what condition it was in and how it worked. He was standing directly over the lever and in a stooping position. He did not open it with his right hand, but put both hands on the lever and pulled up on it, and when he did so the lever flew up and struck him just about his left eye, near the base of the nose. I am not positive, but I think it was his left eye. I was standing looking at him, and when the lever struck him he fell over. I caught hold of him and called for help. I think he was unconscious at that time. He did not say anything or make any kind of a noise. I did not see any one work or operate the ash pan opener before the accident. I did not operate it myself before or after. I saw some one operate the ash pan opener about ten minutes after the accident. I think it was Mr. Fuller. This happened about 11:20 a. m., I think. There were some men on the other side of the engine when the accident happened, but I do not know their names or whether they saw the accident. There was no one else on that side of the engine at the time. A negro boy by the name of John Perry came to me some time after the accident and said he saw Mr. Lloyd when he got hurt. This was the first time I had been called since signing up as a fireman. The engine was not over a pit. There was no occasion for opening the ash pan, other
80 than to see what condition the lever was in. He did not say anything before opening the ash pan.

"This covers all I know about the accident.

(Signed) H. S. WILLIAMS.

"Witness:

T. M. DEANE."

I left this statement in the office when I made it out; I made it out in the presence of Mr. Deane, whose name is signed there; he copied what I said to him and I just left it in the office; I signed my name to it and left it there; he was a clerk in the office, bookkeeper in the master mechanic's office.

Recross-examination:

I signed the statement the same day I made it out; I did not write it, they wrote it; they sent for me and took me up to the railroad company's office; I don't think Mr. Fuller was there; the office is in connection in the same place, just a room off from Mr. Sasser's office; Mr. Sasser is the master mechanic; I am under him; I made the statement out, they wrote it as I said it. When I came down here I found that I made a statement for Mr. Lloyd. Claim agent of the Southern Railway Company never came to see me; Mr. Vuncannon talked to me this morning; don't remember anybody talking to me in regard to the statement. I might have told some of them that I signed the statement for Mr. Lloyd; they did not tell me that I had to swear for the railroad; I am not making a different statement from what I made to Mr. Lloyd because I am afraid I might lose my job if I don't swear by the railroad; I don't know that men lose their jobs with the Southern Railway Company if they swear against it in court; I never heard of it; I had not thought a thing about the other statement I made, I was just going about the matter to the best of my judgment; I had not thought a thing about the other statement I made, I was just going about the matter to the best of my judgment; I was giving it as honestly and as intelligently as I could; Mr. Lloyd wanted me to come down and make a
81 statement, I was his fireman: Mr. Lloyd did not suggest anything; I went ahead and told it to the best of my knowledge at that time.

Redirect examination:

Since refreshing my recollection from the statement I made prior to this, calls it to my mind and I remember it differently; the first statement I made is a true statement.

CHARLEY HAIRSTON, witness for the defendant, being first duly sworn, testified as follows:

I am working for the Southern Railway Company as grate man; at the time Mr. Lloyd was hurt I was working for it, putting in grates; I commenced working for the railway company in 1895; at the time Mr. Lloyd was hurt, I had been down to the engine, walked around it, looked at it, and was on my way back toward the house, stopped and turned around; I looked at the engine to see whether it was all right in my line of business; what I had to do with it, see whether the grates were on all right; I always walk around to see if any grates are uncoupled or anything. I had been down there and started on back and stopped and turned around and looked at the engine. It was all cleaned up, bright, fresh painted, that is the reason I looked at it. Mr. Lloyd came down on the lefthand side and walked up to the engine a piece and looked over it with his oil can in his hand; he walked back to the ash pan lever and caught hold of it and pulled at it, but he did not pull it up; he walks up about half way of the engine and puts on the oil and walks back down to this lever and catches hold of it and gives two pulls at it

and it comes open. He was standing with his face right towards it; when he pulled it he was standing at right angles to the engine and at right angles with respect to the lever; when it comes up he fell over; I did not operate the lever and ash pan that day; I did not see any one else operate it, I never stayed there, I left and went
82 on back to the house; I looked at it before the accident occurred; I looked at the ash pan, damper and lever; it was shut down; that was before Mr. Lloyd came down there.

Cross-examination:

I am working for the Southern Railway Company; never been a witness before for them in my life; I work for them now at Spencer; when the injury occurred I was as far from the engine as from here to the back part of the house; had started on back to the house; the reason I turned around was my attention was called to the engine, it was clean and shiny; I see them in this condition every day when they come out of the shops; I was on my way back to the roundhouse; I stopped and turned around to look at this particular engine because I wanted to, it was clean and bright; I looked at all of them when they come out of the shops; I was standing out there in the open, I could look over the whole engine; I don't know how many engines were on the yard; I can't say how many, can not say there were fifty, can not say there were one hundred; there was a whole lot of them in the roundhouse; I was going to the roundhouse. This engine was bright and in good fix; it looked all right and was all right so far as I know. Lloyd got up when the lever hit him; I never heard him talk; he got up by himself; I didn't go back to the engine; there were other men there; he was knocked over; I don't know how much he weighed; he is bigger now than he was then; he looked to be a strong man. Was not as big as he is now; I don't know whether he had two hands or one hand; he made the second pull, walked away and come back of it the second time; I was in a position where I could see him; I could not say whether he had both hands or not; his back was to me; yes, sir, I know whether he put his hand on it or not; I can tell when a man is pulling at anything; I did not see down between his legs, he was pulling it; I didn't have a spy glass; I didn't see which hand he had; yes, sir, he pulled at something, this I could tell by the motion of his posterior that he had hold of something in front; when
83 he come down off the engine he had an oil can in his hand; I said he came down off the engine and walked up and put some oil on it; I don't know what he did with the oil can; carried it with him or sit it down; Mr. Lloyd got down off the engine and got down on the lefthand side.

Redirect examination:

There were others there to help Mr. Lloyd; they were white men; so I just walked off.

S. J. SHUPING, witness for the defendant, being first duly sworn, testifies as follows:

I am not in the employment of any one at the present time; I am a real estate agent; I was in the employment of the Southern Railway Company at the time Mr. Lloyd was injured; I was a cinder pit foreman; my duty was to check all engines that came in and get the time they came in on the pit and how long they stayed on; take out the ash pans and see that the fires were properly cleaned and that the ash pans were O. K., see that they were properly sparked; see that the engines were properly cared for while they were on the pit; engine 579 was on the pit that day; she came on the pit, as I remember, about 11:20; she did not come right on the pit; she drove on the pit about the intermediate driver, that is about the middle of the engine part, the balance was off; I was at the lower end of the pit and had my men shoveling and throwing off the dirt; as soon as the engine came on the pit, I went to it right away to see what was needed and see what was to be done so that I could get out of the way of the dirt; I went, and when I was going up to the engine I seen a machinist or some one, a workman, come down and go down and go to work about the cylinder cocks or something on the front of the engine. I goes on up and examined the ash pan and what things were necessary to examine, and seen that the engine was just fired and nothing in the ash pans. At that time the ash pan and lever were all O. K. I seen the whole ash pan, lever and
84 all; they were in good condition; it was closed; I am satisfied that it was closed because all indications showed that it was closed; I know it was closed, yes, sir; I turned around then, as I remember; there is a little house there, standing about ten feet from the track, kinder of a shelter to get under when it rains; I had my books there and one thing and another that I kept records on; as I remember, I turned around to take a record of this engine, and while I was taking a record this fireman came around back of the engine and run up to me and said a man was killed around there. It surprised me, I did not know whether some of my men had got in a scrap or what, and I rushed around as quick as I could, and when I got around there, around the engine where he was, he was lying right backwards; it seemed as if he had been standing right facing the engine and fell right backwards. He was lying from the engine; he was lying back from it, feet toward the engine. I ordered some one, fireman here or some one, to take up his head; about that time John Perry came up; some one took it up, I don't remember now, and could not say, and we got some water and put on it. In the meantime I sent the fireman or the fireman went and phoned for the doctor. While we were there a few minutes, I found that we could move him, and we went to pick him up and carry him around to this little shanty on the other side of the engine, and when we started to pick him up he said he could walk, as I remember, and we led him on around to where this little shanty was and set him down on a bench; then the doctor came and we put something over his eye; at that time they had got him on a stretcher down there, and some of my men and others carried him from there, and they

sent him to the hospital. I saw the lever operated just afterwards; it was inside of five or ten minutes afterwards; it operated all right; it was a little bit tight, operated a little bit tight, as most of them do when they come out of the shop just newly overhauled. I did not take hold of it at all as I remember; some of the men oper-
85 ated it and I stood looking at them operate it and seen it; it was just a little tight, but nothing out of the ordinary, just like newly overhauled ones are; I don't think it was in a condition to fly up without being operated by hand; the proper way to operate a lever in opening the ash pan is to stand sidewise to it either way, facing the front of the engine or facing toward the rear of the engine, and catch it with either hand and operate it; if it kicks, then it will come up and not hurt you; if it is operated right there is no danger; if you operate it standing at right angles it is dangerous then; when it comes over the center it kicks; if it strikes you any way it will damage you.

Cross-examination:

I made a written report to the railway company; I reported to them, best as I remember, as I say now, that it was all O. K., only it was adjusted tight, just as I try to say it now. I said it was adjusted tight, but not out of the ordinary for an engine just to come out of the shops.

(Witness is shown a statement.)

That is the original statement; there were several copies taken, I reckon half a dozen, but I signed them all at once. I was subpœnaed as a witness in this case the first time by the railroad and by Mr. Lloyd, too; I had a talk with Mr. Lloyd about it; I don't remember what I told Mr. Lloyd now, I could not remember that; I can not remember exactly what I told him in the conversation; I remember telling him it was a little too tight; I don't know about the force of it; of course the tighter they are adjusted the more force there is; if they get hot enough when they become heated and expand, that tends to give it more force; but they have got to get hot enough to expand iron. No, sir, it is not closed, not plumb closed now. If it is properly adjusted it moves up without very much force, not a great deal of force; in pulling the lever up, the top of a man's hand is over the lever; if the lever comes up it has got to come up against the direct perpendicular force of his arm; adjusted as it is now it won't hurt him, no, sir. It is sufficiently tight enough
86 now to close down and stay closed.

Redirect examination:

When they are carried into the shops and repaired they all come out tighter, because they are newly overhauled, everything is snug, all the lost motion taken up. It is a matter of common knowledge with the engineers as to the condition in which they come from the roundhouse, engines, come from the roundhouse. It is supposed that they ought to know; it would be their knowledge because they

must know something about these things; they must know the condition of an engine when they get ready to take charge of it; I can not recall now who subpoenaed me first, at the last trial, the railroad or Mr. Lloyd; I was subpœnaed by both sides.

(Witness identifies statement, which was introduced.)

"SPENCER, N. C., January 16, 1911.

"My name is S. J. Shuping, age 47, married, residence No. 322 E. Ennis St. Salisbury, N. C. Have been working for the Southern Railway Company as foreman at the cinder pit about a month. At the time Engineer Lloyd was injured I was on the right-hand side of the engine and did not see him at the time, as he was out of my sight. Some one called for help and I went around to the other side of the engine and found him unconscious and lying on the ground. I set about at once and arranged for a doctor. Dr. Smoot of Salisbury was the first doctor to him. He was then taken on stretcher to Dr. H. L. Monk's office at Spencer and from there to Whitehead Stokes Sanitarium at Salisbury, N. C. He was in a semi-conscious condition all the time I saw him after the accident. The engine, 579, is the one that he was working around at the time of the injury. This engine had been overhauled and had just come out of the shop and was starting out for trial trip. I looked at the ash pan lever and did not see anything the matter with it.
87 I took hold of it and worked it, and it worked a little tight, as all of them do when they first come out of the shop. I did not see any difference in that engine and other engines just out of the shop. The lever was securely fastened, no defect about it whatever that I saw. I was at Mr. Lloyd's side inside of a minute after the accident.

"This covers all I know about the accident.

(Signed) S. J. SHUPING.

"Witness:

"T. M. DEANE."

If the ash pan gets hot enough it will expand, but it has got to get pretty hot to expand; if the engine had just been fired up, it would not be hot enough to expand; I looked over the holes in the ash pan to see if there was anything in it because that was my duty, and there was not enough in it to expand at that time.

Recross-examination:

I made this statement up in the master mechanic's office; Mr. Sasser is the master mechanic; they reported me correctly in this statement; I did not touch it before or after; my men handled it, I did not.

WALTER RUSHER, witness for the defendant, being first duly sworn, testified as follows:

I occupy a position as boiler maker's helper for the Southern Railway Company; occupied same position the day Mr. Lloyd was in-

jured; I helped Mr. Frick straighten the damper in the back of the engine that day and put it in good condition; the work was done at the roundhouse; the engine was in the roundhouse for repairs; we cut the back damper off and took it up to the shop and straightened it and bolted it back on, and put the rigging back in first-class condition. It operated all right, I could operate it with one hand; it operated like all the rest of them; I don't know who took the engine out from there, I left it where we got it, down over the pit.

88 (Witness operates the ash pan and damper in the court room in the way that he operated it on the day of the injury.)

I left it in good condition; when I left it the ash pan was closed, shut.

Cross-examination:

I work with the Southern, same job; I was down here when the case was tried before; I adjusted the lever a little bit harder than it is adjusted now on the engine; a little harder, tighter and it gave more force to the lever; the tighter you adjust it the more force it gives to the lever; if you get it too tight it won't go down at all; if you adjust it very tightly it goes with great force if you turn it loose. We do not frequently send them out of the roundhouse too tightly adjusted; we adjusted them all about the same, I reckon; they do not come out of the roundhouse too tightly adjusted. I went to work on that engine that morning about 7 o'clock; we got it finished some time about 9 or 9:30 o'clock; the injury occurred several hours afterwards; do not know how many engines I worked on that day; the ash pan and lever had to be repaired, come in to be repaired; there was nothing the matter with the rigging; the damper in the back was burned, the first burned it; we had to take the nuts off to get the damper off; the frame that it works in on the engine is iron; before we send these engines, before they go out on the regular runs, they are taken out and the fireman and engineer take them off to see whether they run all right or not, on a trial trip; I don't know who had taken this engine and fired it up to carry it out before I came.

GEORGE MURRAY, witness for the defendant, being first duly sworn, testifies as follows:

I am employed by the Southern Railway Company, a hostler; held same position the day Mr. Lloyd was injured; I had charge of this engine at one time during that day; I took charge of
89 it in thirty minutes after Mr. Frick and Mr. Rusher had repaired it; I took it out of the roundhouse; I carried it down to the lead, dead track we call it; the ash pan and damper were closed at that time; the engine was in good condition; I did not put it on the pit; I put it right in the dead track, I guess about twenty feet from the pit; Mr. Lloyd was injured on the pit; I didn't do anything toward moving or changing the position of the ash pan, lever or damper while I was on the engine.

Cross-examination:

I did not examine the engine and this ash pan and lever particularly, one way or the other.

E. FULLER, witness for the defendant, being first duly sworn, testified as follows:

I am master mechanic for the Southern Railway Company; have been master mechanic about eight months; I was shop superintendent at the Spencer shops at the time Mr. Lloyd was injured; I went down to where Mr. Lloyd was injured; I suppose about ten minutes after he was injured; I was notified by the roundhouse that some one had been hurt at the cinder pit, and I started to see who it was; going over there to see, I came across Mr. Neighbors, and he was also on the way over there, and we went together; when we got up there they had taken Mr. Lloyd over to Dr. Monk's office, and the engine was just standing then at the same place it was when he was hurt; I examined the damper and rigging to see if there was anything wrong with it; I could not find anything wrong with it; I went around on the side of the engine and took hold of the lever and it was closed; I pulled it up a few times and then the other way; it was a little tighter than that; it was a little tighter than this, worked a little bit tighter and a little bit harder to pull up than this, but easily handled with one hand; I took hold of it with one hand; it was in good condition; I found nothing wrong with it at all, it operated just as they all operated; no difference in that and any of the others.

90 Cross-examination:

I am superintendent of the shops there; foreman of the shops where this work was done; possibly I am the man who would be held responsible if any engine should go out from there improperly adjusted or fixed; I am the one they would look to for that; I could not say personally that I had charge of this particular work and was charged with the responsibility of seeing that it was properly done; it was under my department and I would be responsible to the company; I am still holding the position with the company. A man could handle it with either hand; it was a little tighter than the one here; it was not down there so tight that he needed to take two hands; it was not down so tight that when you pulled it up with that hand you could not hold it and keep it from hitting you; if he pulled it and turned it loose with his head right over it, it would knock him down; the only way for it to hit him in the head is for him to stick his head over it; it was down so that if he took his hands off and got in its reach, it would come with enough momentum to break his skull and knock him flat of his back, if he pulled it loose with his head right over it; it might give him a lick, I don't know whether it would knock him down or not; I don't know as it did have enough momentum to knock him down even if he turned it loose; I could not say whether it would knock a man down, I could not say as to that; it is like an engine newly overhauled, everything

a little stiff; I don't know that it was really too tight for ordinary use; I have seen them on engines tighter than that was; it did not go out of the shop there tighter than they ordinarily use them; I know Mr. Shuping, the man that received them from the roundhouse; I have seen them use looser than that and tighter than that; those nuts sometimes work back and gets them loose, and the man handling the engine is supposed to readjust that to suit the man; in the use of those nuts the levers on the engines are adjusted differently, some tighter and some looser than others; either the fireman
91 or the engineer can look after the firebox and the ash pan; it is the fireman's duty, but the engineers often do it; it is the fireman's duty, but they both can do it; engineers do it as much as the firemen sometimes.

Redirect examination:

The proper way to handle it is just as I handled it there, either facing the front or the rear of the engine with the side to the engine; if a man was handling it in that way he would not injure himself; it is impossible; if he was handling it at right angles with his head over it, he is liable to get a hole knocked in his head; he is likely to get hit in the head with it then.

H. P. NEIGHBORS, witness for the defendant, first being duly sworn, testified as follows:

I am general foreman at Greensboro for the Southern Railway Company; been working for the railway company ten years; I was roundhouse foreman at Spencer when Mr. Lloyd was injured; I went to where Mr. Lloyd was injured about ten minutes after his injury; I met Mr. Fuller going down there, we went down together; Mr. Fuller and I examined the ash pan; he operated it and I operated it; about that time Mr. Sasser walked up; it was in good condition; operated like all the rest; operated in a proper manner.

(Witness shows the jury how to operate the machinery properly.)

You can operate it either way, with your face to the rear end or front end of the engine; it is not proper to operate it standing at right angles over it; if you did, it would be likely to strike you in the head, come up and hit you in the forehead; these ash pans, levers and dampers were approved and in general use; the Southern Railway Company has not taken off these equipments of ash pans and put on different ones on this division since this injury—not on account of that; some of them have been changed as they go through the shops; if an engine is in there for general repairs, they change it; they do not take them off as fast as they can as
92 they come in the shops; they are making them open from the top; the ones they are putting on now are operated with a lever the same as that; it turns down instead of turning up; this lever holds it down; they have a pin to hold it down on the new arrangement; the Southern Railway Company is using this kind of arrangement on some of the regular engines on this division on the same run that 579 is on; we have got it on some of the others; they

have got them running right here out of Greensboro; they change them as soon as they go in for repairs.

Redirect examination:

We made the change to let the damper down from the top instead of raising it from the bottom on account of fire protection; with that damper it would sift out as the engine was running from the bottom; now this allows your fire to go out of the bottom of the pan as it is open from the top; this change was not made because it was dangerous; they have an eccentric there to hold under there; the lever is fastened to the damper; it would not catch by an eccentric like this; it was not necessary for it to have the same arrangement as this because in this you have the eccentric there that would fasten when it was shut.

Recross-examination:

The way it is arranged now, this lever, one end of it, is fixed firmly to the ash pan damper; the lever sits at an angle about forty-five degrees up beyond the damper itself; the lever is attached permanently to the damper and the opening of the lever carries along the damper with it; there is no spring to it, but a good deal of weight; this damper goes down and the lever comes up; the lever comes up just as this lever would come up if you turned it loose.

93 E. C. SASSER, witness for the defendant, being first duly sworn, testified as follows:

I am master mechanic at Spencer; occupied the same position when Mr. Lloyd was injured; I was notified probably about fifteen minutes after Mr. Lloyd was injured; I went to the engine and met Mr. Fuller and Mr. Neighbors. I examined the ash pan damper; I made a thorough examination, and I opened it and closed it; operated it and found it in good working condition; I could not find any defect that would necessitate any further repairs; it was in adjustment; it was in good, first-class work*man* condition in every respect; the ordinarily prudent engineer in handling the lever, in opening and closing the ash pan, stands with his face either to the front or back of the engine and operates it with one hand, either right or left; that is the proper way to handle it. (Witness illustrates with model.) Operated in that way, there is no danger to the operator; if operated with a man at right angles, his hand is liable to slip off the handle of the lever and the lever is liable to hit him in the head; this construction was approved and in general use at that time on the Southern Railway Company.

Cross-examination:

The Southern Railway Company has been changing them for the last seven years; not that particular one; they were doing that for about three years before Mr. Lloyd was hurt; now they are operated with the lever instead of being attached to a connecting rod, they

are merely attached to the damper, and the damper is lifted and closed by the raising and the lowering of the lever. As it was at that time on this engine, it had not been changed; if you stood with your face toward the heel of the engine, or with your face toward the front of the engine, there wasn't any danger in operating the lever; if you did not stand in that position but stood in front at right angles, there was danger if you took hold and pulled it; I knew that as
94 superintendent of the roundhouse; it might have been that some of the employees had instructions to this effect; I don't suppose any had any instructions about the danger if a man operated it right; if he took hold with his head over it and his hand slipped, there was danger; if he got over the side rod there was danger; the reason that the railroad did not take them all off for seven years was not in order to save money on account of the expense of doing it; we started to change the ash pan seven years ago when the Federal law went into effect, that is to get the self-dumping pans; the Federal law did not make us change it, I said we changed to get the self-dumping pan; this is not a self-dumping pan, it is a self-cleaning pan like it is now; we changed on account of the fire sifting through the bottom. This safety appliance will avoid a man getting under the engine to rake the pans out. It was to prevent the men going under the engine for the safety of the employees; to avoid getting under the engine most any way; you can crawl under the engine since they have passed the act as good as before. I was superintendent of the business there, master mechanic, and am still with the Southern Railway Company.

(Witness illustrates to the jury the change that was made in the construction, and why.)

Redirect examination:

If you raise the handle up under the new construction and have your head over there, you would meet with the same results.

Recross-examination:

The new lever is anywhere from eighteen to twenty-five inches long; long enough to knock a man in the head; this model here represents the ash pan, it shows the damper that connected with the ash pan; the ash pan is on a line with the damper; I didn't say that I had great trouble on account of dampers warping to keep fire in there; I did not have to tighten up the nuts on the rod in order to hold it if it is warped and pulled open so that the ashes get
95 out; not every time, we did sometimes; when that was done it might increase the velocity of the lever in operating, momentum of it; you can tighten it up.

H. J. Heilig, witness for the defendant, being first duly sworn, testified as follows:

Am road foreman of engines; I was assistant road foreman at the time Mr. Lloyd was injured; at the time Mr. Lloyd was injured, I was out on the road with the engine; I was to go with him, I believe;

we had several engines that day to break in, and owing to the accumulation, Mr. Lloyd was called to assist me, and he was called to take engine 579; I came down to the roundhouse, I went down and got the engine ready that I wished to take out; the engine that Mr. Lloyd was to take out was delayed for some reason relative to some pipe work, and on account of his being delayed I went on with the engine I had went to Barber Junction; 579 was to go to Barber Junction that day, going with me, double heading or rather coupled in with the same engine I had; went to Barber Junction and returned about half-past 12 o'clock; I saw engine 579 that evening some time; some time along in the middle of the afternoon, about 3 o'clock I would say; I examined it; 579 afterwards went to Elmwood that day; Elmwood is eighteen miles west of Salisbury; Mr. Chandler carried it there; Elmwood is six miles beyond Barber Junction, going west; is in North Carolina; I had engine 1238; we were double heading together, Mr. Chandler had 579, my engine went along with his; there was no freight cars attached to the engine, just two light engines; did not haul any commerce of any kind. I have worked for the old Richmond & Danville road, the Seaboard Air Line, the Raleigh and Southport, and the Southern; have been railroading thirty-one or thirty-two years; I have run an engine about twenty-one years of that time.

(The witness is asked to show his Honor and the jury the proper way of operating the lever and ash pan.)

96 With the model present witness shows that the proper way to handle the lever is with your side to the engine, either facing toward the head of the engine or the tender, and operating the lever by pulling the same up or pushing it down with the right or left hand, according to the way the person is facing.

As I have demonstrated, there is practically no danger at all in operating the lever and damper to the operator; if you are standing at right angles, if you are in a stooping position and operating it leaning over, if you don't offer resistance enough to resist the blow that would naturally be cast by the spring, why the lever will strike you, if for any reason it should get out of your hand, or you should lose your hold on it.

Cross-examination:

Engine 579 is now running between Monroe and Spencer; Monroe, Va.; has been since the injury in regular service; may have been off for a few days at the time for local repairs; it was running between those points before the injury; one of the train engines operating between Spencer and Monroe; it was hauling commerce between the two States, between Spencer, N. C., and Monroe, Va.

C. H. CHANDLER, witness for the defendant, being first duly sworn, testified as follows:

I am an engineer for the Southern Railway Company; have been for seven years and one month; I have run engine 579 several times; run it on the day that Mr. Lloyd was injured, about 2 or 3 o'clock

of that evening, up to Elmwood and back; I first saw it that evening about 1 o'clock, when I was called; it was in good condition at that time; when I carried it out that evening it was in the same condition when I first saw it; it operated just like all the rest of the engines; I did not examine it, but there was a machinist examining it when I came up, and it was examined in my presence; it was 1 o'clock when I came to the engine; we left on the trip a little after 2;
97 I was right at the engine until I left; I saw the examination of the engine when I came up to the engine about 1 o'clock; I stayed with the engine until I carried it out; it was in the same condition when I carried it out as it was when I came up to it; the ash pan and damper was operated in my presence; I was standing in three feet of them the whole time; it was in good condition; I carried the engine to Elmwood on a trial trip, breaking it in, the same day Mr. Lloyd was injured; Elmwood is inside of the State, eighteen miles west of Salisbury; did not go outside of the State with the engine; did not carry any passengers or freight or commerce of any kind; nothing else except the other engine, two of us coupled together, that is all we had.

Cross-examination:

This engine was turned over to me to take out on a trial trip to see if it was ready to go on its regular run from Spencer, N. C., to Monroe, Va. I was called to take it a few minutes before 1 o'clock; did not go until 3 o'clock because we were waiting for some work to be done on the other engine; did not take this engine back to the roundhouse, stayed there until I left; it was on the dead track between the roundhouse and the cinder pit; it had gone off of the cinder pit; it was about fifty yards from the roundhouse. I found the engine in condition to go out on its regular run the next day; that was the purpose of that trip.

Redirect examination:

In seeing whether it was ready to go out, my duties were to examine the engine and see if everything was in good working order and to run it up and down the road out to Elmwood and back to see what was going to run hot about it, and have that part adjusted; to have adjusted whatever part run hot or give any trouble; when they come out of the shops some parts are put up tighter than the others and they run hot, and that trial trip was to see what was going to
98 run hot and have it remedied; to see if it was in first-class condition to run, ready for the road.

Recross-examination:

My duty was to find out whether at the roundhouse they had got it too tight or too loose, or properly adjusted, and if I find they are not properly adjusted to report to the roundhouse, bring it back and report it to the roundhouse, and they fix it. As to whether I shall fix it, it depends upon the extent; if it is a good, big job we get the

machinist to do it; if it is just a little job that won't take more than a minute or two, we do it ourselves; if it was adjusting a nut on the ash pan lever, we would do that ourselves. It would be our duty, in one way; it was a small job, that is what we worked for; if we could fix a small job before we could get a machinist, we do it ourselves; sometimes the fireman has to adjust the ash pan, tighten them up; they get too tight or too loose. If you get knocked in the head before you get to it you can't adjust it; sometimes the engineer adjusts it, too.

Mr. YOUNCE, witness for the defendant, being first duly sworn, testified as follows:

I have had about twenty-five years in railroading; been working for the Southern about fifteen years as engineer; working for the Southern as engineer now; can not say positively that I saw engine 579 on the day Mr. Lloyd was hurt; I saw the engine at the roundhouse; I was carried to the engine by the roundhouse foreman to make inspection and look over the damper rigging to see if everything was in good condition. Mr. H. B. Neighbors was the roundhouse foreman.

Mr. H. B. NEIGHBORS, recalled to the stand:

No. 579 was the engine I carried Mr. Younce to examine, about thirty minutes after Mr. Lloyd was hurt; the engine was between the roundhouse and the cinder pit; we had moved it off of
99 the cinder pit; the condition of the damper and the lever were the same when I carried Mr. Younce there as they were when I found it after the plaintiff was hurt.

Cross-examination:

Hadn't been anybody working with it before Mr. Younce saw it; there had been three with myself had made an examination of it before Mr. Younce saw it; if you had the wrench it wouldn't take very long to change the adjustment of that nut so as to loosen the power of the lever; it would take about three minutes; if it was screwed up very tight it would take longer to do it.

Mr. YOUNCE resumes the stand:

We examined the ash pan and damper rigging, myself and Mr. Moore in Mr. Neighbors' presence; it was in first-class condition; by first-class condition I mean it was in condition to close, keep the ash pan closed to keep the fire, keep it from throwing fire along the line of road. It was in a condition that you could handle it, you could handle it with safety. The safe way to handle it is to handle it with your side to it, either side, and when you raise the lever your body and head will be put out of the way; if you step up to it at right angles with your face toward the engine, if you pull it and not have a good hold on the lever, it would get out of your hand and hit you in the head.

Cross-examination:

It will knock you down no matter whether it is screwed tight or not, if you get over one, it is a dangerous machine. A locomotive is no more dangerous than any other piece of machinery if it is handled properly; if you are particular about what you do, I don't think it is dangerous, because I have been running an engine up until three months ago, and I have been handling that very same ash pan, and I never got hurt. The way this one (the model) is adjusted it is not tight enough, that would not stay locked on an engine on a line of road; it remains closed, sitting there. In order to operate it safely you have got to stand in a particular way, in a proper position; I am running on this same run from Spencer to Monroe, Va.; running on this same engine; I am a regular engineer. Mr. Lloyd was an extra on that line.

Redirect examination:

The reason this would not be tight enough for you to undertake to run an engine over the roads is that it would come loose, the jar would throw it open and throw fire on the road; when we operate an engine it is tighter than that (the model). When I examined this engine just after my attention was called to it, it was tight enough to be easily handled with one hand.

J. D. OWEN, witness for the defendant, being first duly sworn, testified as follows:

I live at Spencer; my former home was at Greensboro. I am handy man at the boiler shop; I saw engine 579; I took the rigging off of it; the rigging in court looks like the one I took off of engine 579; the rigging I took off I put in Mr. Fuller's office; I took the door off and the rod; it was just like it is now, only the door was taken off; I took all of that machinery there off of 579; it is the same model we had here at the last trial; same model in every way; I recognize it; we had it standing out there, had a handle, and they couldn't get it in the door and sawed it off there; I don't see any change in it that I can detect; I took that ash pan lever and damper from No. 579; I put it in Mr. Fuller's office; I took it from 579 right after it came back from the trial trip; I don't know whether it was the evening Mr. Lloyd was injured or the next morning, but before the engine went out again, I know.

Cross-examination:

The reason I took it out I had orders from my foreman to take it out and put it in Mr. Fuller's office; I am working for the Southern Railway Company now; been working for them six years; engaged in putting up levers, dampers and ash pans; I have put on one like this on engines of the Southern Railway Company on this division since this injury happened; we put them on every month; this same class of engines; they don't change them any at all on the 1000 class; these are passenger engines; I don't know that they are the

poorest class ones, I guess they are as good as the others, they run them on passenger trains; I don't know that the 1000 is recognized as an inferior engine that has a different kind of an arrangement on it; they are not as large as some and not as small as some; I can not tell you how old they are. They call that class 1000 because they are a different class; that is the number of the engine; put them on the 100 class and not on the others because the pan goes back there under the firebox; you can not work one of them as good on the 1000 as you can on the other engine; you can put this new arrangement on one of the old engines; we don't do it; I don't know how many of the engines have changed in the last three years; we have got about all of the Southern changed except the 1000 and a few of the 500 class are not changed; we change them as fast as they go through the wrecking shop.

Redirect examination:

The 1000 engine is a passenger engine; the 500 is a freight engine.

S. S. MOORE, witness for the defendant, being first duly sworn, testified as follows:

I am an engineer, been an engineer for twenty-two years; run on the Southern Railway; my run is from Spencer to Monroe, Va.;
I saw engine 579 on the day Mr. Lloyd was injured; about
102 thirty minutes after he was injured; I was in the round-house office at the time of the injury; I examined the engine; it was in O. K. condition; I mean by O. K. that it was all right, worked all right. Mr. Neighbors asked me and Mr. Younce to go out there and examine it and he went with us, and I operated it and it worked all right; was in good condition. The proper way to operate an ash pan lever and damper is to raise the handle up and down with your face to the front of the engine or back of the engine, either way you choose; raise it with the right or left hand; it can be operated safely in that way; it can be operated by standing with the face to it with right angles with safety if it did not get out of your hand; if it got out of your hand it would be liable to hit you in the fact or hit you somewhere.

Cross-examination:

The tighter it was adjusted the harder the lever would hit you if it got out of your hand; I examined it about half an hour after the injury; Mr. Lloyd was carried to the hospital; Mr. Neighbors asked me and Mr. Younce to go up there and examine the ash pan and see if it worked all right; that is all he said. I am not able to answer for Mr. Neighbors why it was that he was around getting up witnesses when the other man was knocked senseless; you will have to ask him.

Dr. WHITEHEAD, witness for the defendant, testified:

That Mr. Lloyd was carried to his hospital, and as to the extent of his injuries and his condition while there, and as to the probable effect of the injury upon Mr. Lloyd.

Dr. R. V. BRAWLEY, witness for the defendant, testified:
As to the examination of the plaintiff's eyes before and after the injury, and as to the extent of the injury to the plaintiff.

103 Dr. E. R. MICHAUX, witness for the defendant, testified:
As to the treatment of Mr. Lloyd and extent of his injury, and the probable effect upon him.

The defendant introduced portion of paragraph seven of the complaint, as follows:
"That on the 12th day of January, 1911, the plaintiff was ordered and directed as engineer aforesaid to take charge of engine No. 579 at Spencer, which had just come from the repair shops, and to ascertain whether or not said engine was in serviceable condition. That the plaintiff accordingly, as directed, took the engine, which he was unaccustomed to operating, upon one of the sidetracks of the North Carolina Railroad Company's main line at Spencer, and was oiling and inspecting same."

Defendant introduced picture of engine No. 579.

Defendant rests.

Mrs. W. L. LLOYD, witness for the plaintiff, is sworn, and testified:
That she was the wife of the plaintiff; been married to him twenty-two years; as to his physical condition before and after the injury, as to the extent of his injuries and the consequent effect of his injuries upon him since, and as to the permanent character of same.

Dr. H. H. *DOBSON*, witness for the plaintiff, testified:
As to the probable effect of the injuries of Mr. Lloyd upon him and the permanency of their character.

Dr. H. P. BOWMAN, witness for the plaintiff, testified:
That he was the plaintiff's family physician, and as to his condition before and after the injury, and the probable effect and permanent character of the injury to him.

104 There was evidence tending to show that the plaintiff was permanently injured by the breaking of his skull, and that as a result he has neurasthenia, impaired eyesight, disordered mentally, and his nervous system broken down.
There was evidence on the part of the defendant tending to show that plaintiff's injuries were not so serious as alleged by him, and that the results were not so permanent or severe as testified to by his witnesses.
Dr. Whitehead, witness for defendant, upon cross-examination, testified that the plaintiff had neurasthenia.
At the close of all the testimony the defendant, Southern Railway Company, renewed its motion to nonsuit the plaintiff under the Hinsdale Act. Motion denied. Exception by the defendant, Southern Railway Company.
Third Exception.

The Court intimated that it would submit the following issues to the jury:

(1) Was the plaintiff injured by the negligence of the Southern Railway Company, as alleged in the complaint?

(2) Was the plaintiff, at the time that he received such injury, engaged as an employee of the Southern Railway Company in interstate commerce?

(3)Was the North Carolina Railroad Company, at the time of the alleged injury of plaintiff, engaged in interstate commerce?

(4) What damages, if any, is plaintiff entitled to recover of the Southern Railway Company?

(5) What damages, if any, is plaintiff entitled to recover of the North Carolina Railroad Company?

The defendant, the Southern Railway Company, requested the Court, in addition to the first three issues, to submit, upon the question of negligence and damages, the following issues, which the Court declined to submit, to wit:

Did the plaintiff contribute by his negligence to his own injury, as alleged in the answer?

105 How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him?

What sum should be deducted from the damages sustained by the plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?

The defendant, Southern Railway Company, excepted to the refusal of the Court to submit the issues tendered by the defendant, and excepted to the issues as submitted by the Court.

Fourth Exception.

The defendant, the Southern Railway Company, in apt time, requested his Honor to charge the jury as follows:

"If the jury find from the evidence that the plaintiff was an extra engineer in the service of the defendant, and had been in the continuous service of the defendant from June, 1910, until January, 1911, at the time he was hurt, and that on the day he was hurt he was assigned to the duty of examining and inspecting engine No. 579 and taking it out upon a trial trip in order to test the engine and its apparatus and parts to ascertain whether or not they were in proper condition and repair; and the jury further find from the evidence that the engine had been in the shops for repairs and had been repaired, and that the nuts upon the ash pan damper which controlled the operation and adjustment of the lever had not been properly adjusted, then it was the duty of the plaintiff to see that they were properly adjusted; and if the jury find that the injury was caused by the improper adjustment of said nuts, this would not be negligence on the part of the defendant for which the plaintiff could recover, and the jury should answer the first issue 'No.'"

His Honor declined to give this instruction, and the defendant, the Southern Railway Company, excepted.

Fifth exception.

The defendant, the Southern Railway Company, in apt time, requested his Honor to charge the jury as follows:

106 "If the jury find from the evidence that it was the duty of the plaintiff to examine, inspect and test the engine for the purpose of ascertaining whether or not it was in serviceable condition, and in order to discover whether or not it had been properly repaired, and he was injured by reason of a failure to adjust any part of the engine which it was his duty to inspect and adjust or report its condition, then the defendant would not be liable for any injury he sustained on account of the improper adjustment of such part; and if the jury further find that his injury was caused by the failure to adjust such machinery, which it was his duty to inspect and test, then the jury should answer the first issue 'No.'"

His Honor declined to give this instruction, and the defendant, the Southern Railway Company, excepted.

Sixth exception.

The defendant, the Southern Railway Company, in apt time requested his Honor to charge the jury as follows:

"If the jury find from the evidence that the lever to the ash pan damper had been so adjusted by means of the nuts that it was too tight for ordinary use and service, and that the plaintiff undertook to operate the lever and pulled upon it with his hands and stood in such a position that his head was immediately over the lever, and that by reason of his pulling it loose from its fastening it flew up and struck him in the face, this would not be the negligence of the defendant as alleged in the plaintiff's complaint, and the jury should answer the first issue 'No.'"

His Honor declined to give this instruction, and the defendant, the Southern Railway Company, excepted.

Seventh exception.

The defendant, the Southern Railway Company, in apt time requested his Honor to charge the jury as follows:

"If the jury find from the evidence that the plaintiff was an employee of the defendant as an extra engineer without any

107 regular run or assignment, but that he belonged to the division which extended from Spencer, North Carolina, to Monroe, Virginia, and that occasionally he worked upon an engine running from North Carolina into Virginia, and the jury should find from the evidence that engine No. 579, upon which he was injured, was ordinarily used in carrying trains from Spencer, North Carolina, to Monroe, Virginia, carrying trains, freight or passengers, between the two States; and the jury should further find that on the day the plaintiff was injured he was assigned to the duty of taking engine No. 579 from the shops in Spencer, North Carolina, to Barber Junction or Elmwood, North Carolina, both points being within the State of North Carolina, and it not being necessary to go outside of the State of North Carolina between the two points, and that the engine was to operate without cars, either freight or passengers, attached, or without carrying passengers or freight of any kind, then

the plaintiff, at the time he was injured, was not engaged in interstate business."

His Honor declined to give this instruction, and the defendant, the Southern Railway Company, excepted.

Eighth exception.

His Honor charged the jury as follows:

Judge's Charge.

NORTH CAROLINA,
Guilford County:

In the Superior Court, September Term, 1913.

W. L. LLOYD
v.
THE SOUTHERN RAILWAY COMPANY and the NORTH CAROLINA RAILROAD COMPANY.

GENTLEMEN OF THE JURY: This is an action brought by W. L. Lloyd, the plaintiff, against the Southern Railway Company and the North Carolina Railroad Company to recover damages for an injury which he alleges he sustained by reason of the negligence of these defendants. The plaintiff alleges, gentlemen, that the de-
108 fendants are each corporations, and that the North Carolina Railroad Company is the owner of a railroad extending from Goldsboro to Charlotte, and that the defendant, the Southern Railway Company, is the lessee of the said road from the defendant, the North Carolina Railroad Company, and was at the time of plaintiff's alleged injury, operating the same as such lessee. He further alleges that he was employed by the Southern Railway Company, and that he was an engineer employed as an extra to operate an engine and cars from the town of Spencer, N. C., to Monroe, in the State of Virginia. That on the occasion of his injury he alleges that he was ordered to take out engine 579 from Spencer for the purpose of a trial trip; that that engine had been out of repair and had been sent to the shops at Spencer for repairs, and after the repairs had been made, before putting the engine back into active service, it is customary to send it out upon a trial trip to see whether or not it was in serviceable condition, and that it was his duty as engineer to take it out, and if he found it defective in that respect and not in serviceable condition, why, he was to report it to the shop that it might be remedied before sent upon its regular work, and that while he was stooping down and looking under parts of the engine to discover whether the adjustment of the ash pans were proper, he was suddenly stricken and knocked senseless, and that he remained unconscious for several days; that he was confined to the hospital for, perhaps, a month, and to his room and house for some time thereafter; that he has been permanently injured by reason of the blow received at the time he was inspecting this engine, and that he has been damaged to the amount of forty thousand dollars.

The defendants each admit, gentlemen, that it is a railroad. The North Carolina Railroad Company denies that it is engaged in interstate commerce, and the Southern Railway Company admits that it is engaged in interstate commerce. The Southern Railway
109 Company admits that it is the lessee of the North Carolina Railroad, and at the time of the plaintiff's injury, it admits that it was engaged in interstate commerce. It further admits that the plaintiff was in its employ as an engineer, and that it was his duty to take this engine, 579, out on a trial trip, and to inspect it, and it alleges that it was his duty to fix such parts as he could, and such parts as he could not fix, to report to the shop, so that it could be fixed; but the defendant denies, gentlemen, that it was negligent, as alleged by the plaintiff; denies that the plaintiff was injured to the extent that he claims, and further alleges that the plaintiff was guilty of contributory negligence, that is, he was guilty of negligence himself in failing to exercise ordinary care for his own safety, and that the plaintiff is not entitled to recover anything.

The North Carolina Railroad Company denies that it was engaged — interstate commerce. It admits this lease of its road from Goldsboro to Charlotte to the Southern Railway Company. It denies that the plaintiff was injured upon its right of way, and denies that the plaintiff was injured as alleged, or that it is in any way liable to the plaintiff by the injury.

These allegations and denials upon the part of the plaintiff and the defendants raise certain issues which you are to pass upon. These issues are as follows:

"1. Was the plaintiff injured by the negligence of the Southern Railway Company, as alleged in the complaint?

"2. Was the plaintiff at the time that he received such injury engaged as an employee of the Southern Railway Company in interstate commerce?

"3. Was the North Carolina Railroad Company, at the time of the alleged injury of plaintiff, engaged in interstate commerce?

"4. What damages, if any, is plaintiff entitled to recover of the Southern Railway Company?

"5. What damages, if any, is plaintiff entitled to recover of the North Carolina Railroad Company?"

110 In order that we may get certain matters out of our way, the Court will charge you upon the second, third and fifth issues. The second issue is, "Was the plaintiff engaged as an employee of the Southern Railway Company in interstate commerce?" Upon that issue the burden is on the plaintiff to show by the greater weight of the evidence that he was, and if he has so shown, you will answer that issue "Yes." If he has not so shown, you will answer it "No."

The Court charges you that if you find the facts to be true, as testified to by the witness in this case, you will answer that issue "Yes." otherwise "No."

The third issue, "Was the North Carolina Railroad Company, at the time of the alleged injuries to the plaintiff, engaged in interstate commerce?" Upon this issue the burden is on the plaintiff to show by the greater weight of the evidence that it was so engaged,

and if the plaintiff has so shown, it will be your duty to answer the issue "Yes." If the plaintiff has not so shown, gentlemen, you will answer it "No."

Upon the third issue the Court charges you that if you find the facts to be as testified to by the witnesses, you will find that the North Carolina Railroad Company was not, at the time of the alleged injury to plaintiff, engaged in interstate commerce, and you would answer that issue "No," otherwise you will answer it "Yes."

The fifth issue is, "What damages, if any, is the plaintiff entitled to recover of the North Carolina Railroad Company?" Upon the fifth issue the Court charges you, gentlemen, that if you find the facts to be as testified to by the witness, you will answer that issue "Nothing."

Now, gentlemen, we will come back to the first issue, which is, "Was the plaintiff injured by the negligence of the defendant, the Southern Railway Company, as alleged in the complaint?"

The plaintiff alleges, gentlemen, that the machinery used in operating an ash pan and the lever of the ash pan was in a defective condition, and that by reason of that defective condition, the
111 lever of the ash pan flew up and struck him in the head and inflicted the injury of which he complains. The plaintiff alleges that the defendant, the Southern Railway Company, was guilty of negligence in allowing this condition of affairs to exist. This first issue, gentlemen, involves three questions or propositions which you are to pass upon. The first is, "Was the plaintiff injured as alleged? It is admitted, gentlemen, that the plaintiff was injured on the occasion in question, and it will not be necessary in passing upon this issue for you to determine the extent of his injuries. Hence, in passing upon this first issue, if you find that the plaintiff was injured, gentlemen, then it will be your duty next to inquire whether or not the defendant company was negligent, as alleged by the plaintiff.

Negligence, gentlemen, is the failure to exercise ordinary care, and what is ordinary care depends upon the circumstances of each particular case. It is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances.

The Court charges you, gentlemen, that this is not a case in which you can infer negligence from the simple fact that the plaintiff was injured, as contended by him; but the burden is upon the plaintiff to show by the greater weight of the evidence that the defendant company was negligent, as alleged. The negligence alleged is that the machinery used upon engine 579 for controlling the ash pan damper was defective in that it was adjusted so tightly that it made it unsafe to operate the lever in raising and lowering said ash pan upon this occasion.

("A.")

The Court charges you that if you find the facts to be as testified to by the witnesses, you will find that the proper way to operate the lever in question was for the operator to stand facing either the front or the rear of said engine, and to operate the lever with one hand, and if you find this to be true, the Court charges you that if you further

find from the greater weight of the evidence that the lever
112 in question was adjusted so tightly that it could not be operated with one hand by one standing facing the front or rear of said engine with reasonable safety to himself, that this would be negligence upon the part of the defendant, and you should so find, and if you should further find from the greater weight of the evidence that the plaintiff tried to operate said lever while so adjusted, and was injured thereby, and that said negligence was the proximate cause of the plaintiff's injury, you will answer the first issue "Yes." And by proximate cause I mean the nearest or direct cause of the injury. But if the plaintiff has failed to show these facts by the greater weight of the evidence, you will answer the first issue "No." Or if you should find from the evidence that the appliance in question was so adjusted that it could be operated with one hand by a person standing in the position above indicated, that is, facing either to the front or to the rear of the engine, with reasonable safety to himself, you will answer the first issue "No."

("B.")

So, gentlemen, in passing upon this first issue it is important for you to determine from this evidence how this appliance was adjusted, this appliance for raising and lowering the ash pan damper. The plaintiff contends, gentlemen, that under the evidence you should find that it was adjusted tightly, and adjusted so tightly that one man could not operate it with one hand with reasonable safety to himself, and as bearing upon this question the plaintiff relies upon the testimony of defendant's witnesses, one named Hairston, who is a colored man. He testifies that it was his business to look and examine the ash pan, and that he did examine it, and that he was walking off, and that this was a new engine—that it was bright—and he turned to look at it, and he saw the plaintiff take hold of the lever with one hand as if to operate it, and that it would not operate,
and that he walked up by the engine a short distance and
113 came back and took hold of it with both hands, and that then the lever kicked and struck him in the head, knocking him down.

The plaintiff further contends that another witness by the name of Williams testified that he was the fireman upon this engine, and was going out with the plaintiff upon this trial run, and he testified that he was there, and that the plaintiff started around the engine with an oil can in one hand, and that he took hold of this lever with one hand and tried to pull it up, but that it would not work, and then he took hold of it with both hands, and then it kicked and struck him, knocking him in the head.

In connection with that testimony, the plaintiff contends that from the character of the blow inflicted upon his head, that it knocked him senseless, as he contends the evidence shows, and that he was unconscious or in a semi-conscious condition for several days, and from the character of that blow, taken in connection with the testimony of these two witnesses, that you should find that this ap-

pliance was adjusted so tightly that it could not be operated with safety by a person standing facing either the front or the rear of the engine, and that the defendant company was guilty of negligence in that respect. So that, the plaintiff contends, gentlemen, that upon this evidence you ought to find that was the condition of affairs. The defendant contends that you ought not to so find. The defendant introduced Mr. Frick, and he testified that on this morning about 7 o'clock he took charge of a part of this engine for the purpose of repairing it, and that he did it, and after repairing the damper that he put it back on and that he adjusted it; that he operated it, and that he could operate it with one hand, and that it was in good condition, and he says that this was about 9 o'clock of the day that the plaintiff was injured, the plaintiff testifying that he was injured about 11 or 11:30. The defendant introduced another witness who testified that he helped to adjust this damper, and that he either operated it or saw it operated, and that it was in good con-
114 dition and could be operated with one hand; that it was not too tight. Then another witness was introduced; he testified that he took this engine from the shop or roundhouse where it was and carried it out and placed it on the dead line about twenty or twenty-five feet from the cinder pit, and he left it there, and he says so far as he could see the lever and ash pan were in good condition. Upon cross-examination, he testified that he didn't examine the particular ash pan or lever. The defendant introduced Mr. Sasser, Mr. Neighbors, and Mr. Fuller. Mr. Neighbors and Mr. Fuller testified that they examined this appliance about ten minutes after the accident, and they testified that it was in good condition, that it was not too tight; that you could operate it with one hand standing in the proper position with safety to yourself; that they went there and operated it. Mr. Sasser testified that he heard about it about fifteen minutes after the accident, and went there and examined it, testifies it was in good condition. Three or four engineers testified they were called on—two of them, I believe, testified they were called on to go there and examine it, and they did about thirty minutes after the accident is supposed to have occurred, and that they found it in good condition. Then another witness testified that he examined it along about 12 or 1 o'clock; that he stayed with it until the time that he took it out, and that it was in proper condition; and then, perhaps there is other testimony upon that. If there is, you will remember it. So that the defendant contends upon this evidence that the defendant company was not negligent on account of this appliance being adjusted too tightly. They offer testimony tending to show that before and just after it was examined by parties and that it could be operated and was operated by them with one hand, and that you ought not to find that the defendant was negligent in that respect.

The plaintiff himself testified, gentlemen, that he didn't take hold of this lever at all; that if he touched it he didn't know it; that he didn't go there for the purpose of operating it; that his at-
115 tention was attracted to what he thought was some disarrangement of the coal pan—ash pan—and that he was looking

under to see at the time, and it flew up and struck him. So, that, gentlemen, it is contended that you can not find from this evidence that the plaintiff was injured by the negligence of the defendant, as alleged, and that you ought to answer this issue "No."

Whereas, the plaintiff contends, in reply to that, that you ought to find that he was injured in that way; that this was too tight; that the two witnesses introduced by the defendant that were standing there and saw it, saw the plaintiff attempt to operate it, and that he tried to operate it with one hand and could not, and then attempted to operate it with two hands, and then it was that he got injured, and that he didn't operate it with one hand because it was so tight he could not. So the plaintiff contends you should find this question of negligence in his favor. This is a question for you, gentlemen.

If the plaintiff has shown by the greater weight of the evidence that he was injured by the negligence of the defendant, as allewed, why you will answer that first issue "Yes." If he has not so shown, you will answer the issue "No."

If you answer the first issue "Yes," gentlemen, then you will proceed to answer the fourth issue, "What damages, if any, is the plaintiff entitled to recover of the defendant, the Southern Railway Company?"

The burden upon this issue is on the plaintiff to show by the greater weight of the evidence the amount of damages he has sustained.

In passing upon this issue you will first ascertain or assess the actual damages that the plaintiff has shown by the greater weight of the evidence that he has sustained, and in assessing his actual damages you will fix one lump sum or one compensation for all injuries past and prospective, proximately caused by the negligence of the defendant. In estimating such damages, gentlemen, you will consider his loss of time, if any, his loss from inability to perform
116 ordinary labor, if any, his loss of bodily and mental powers, if any, his actual suffering both in body and mind, if any, provided the plaintiff has shown by the greater weight of the evidence that such losses and suffering are the immediate and necessary consequences of the defendant's negligence.

In passing upon the question, gentlemen, of the actual damages plaintiff has shown he has sustained, you will not consider damages that he might possibly or by a possibility suffer. That is not the rule. But only such damages as are the necessary, natural or probable consequences of the injury inflicted, can you consider, gentlemen, in assessing his damages.

The plaintiff contends, gentlemen, that he has been damaged to the amount of forty thousand dollars; that he ought to recover forty thousand dollars. He contends, gentlemen, that the evidence shows that prior to the accident he was a strong, healthy man; that he had employment as an extra engineer; that he was paid about nine dollars—perhaps nine dollars and a few cents—for each trip that he took out from Spencer to Monroe; that he had the capacity and strength to serve as an engineer on full time, but at the time

of his injury and prior thereto he didn't have employment as an engineer on full time, but that he was serving as an extra, but that he had the capacity; that he was competent as an engineer, and that he had the physical strength to make full time as an engineer. He testified that he was injured the 12th, and that prior to that time in that month he had made fifty-two dollars, and he says that he had averaged as much as fifty-two dollars for the four or five or six months that he had been working as an extra engineer during the preceding months. He further contends the evidence shows that he was knocked senseless by this kicking of the lever; that it struck him in the head, breaking the frontal bone, mashing in a part of it, and that he was in an unconscious condition for several days; that he was carried to the hospital, and after being there for some time, that he recovered his consciousness and remained there
117 about a month and then came back home; that while he was in the hospital that he suffered pain in his body, and in his mind, that when he returned home he was further treated by Dr. Michaux, the railroad surgeon, and that since that time he has had Dr. Bowman to see him. He contends the evidence shows, gentlemen, that he is a nervous wreck; that he can't sleep at night; that he suffers intermittently with a pain in his head; that there is an offensive and bloody discharge from his nose which he contends the evidence shows was caused by this injury upon his head. He further contends that the evidence shows, gentlemen, that he has what the physicians denominate as neurasthenia, and that this is the condition, gentlemen, in which, as the plaintiff contends the evidence shows, a man is who has lost his grip upon life and no longer takes an interest in things. The plaintiff contends that there is a permanent injury. He further contends that he has lost time, and that he has not the capacity to work now, and that he will never have the capacity to work again. So that the plaintiff contends, gentlemen, that if you come to this issue you should assess him large damages.

Upon the other hand, gentlemen, the defendant contends that if you come to this fourth issue, that though you should find that the plaintiff was injured, and if you should assess him some actual damages, that his damages are not as great as claimed by him, or as contended for by him in this case. The defendant admits, gentlemen, that he suffered by reason of this blow. The defendant contends that his injury is not a permanent injury; that in a few months after he came from the hospital, that so far as his physical condition was concerned, that he was well. The defendants contend that he has neurasthenia in which he imagines he can not work, not that he can't, but that he imagines he can't work, and that if he will exert his will power that he could throw off this feeling, and that it would gradually wear away, and that he would be himself again and that this is not a permanent injury and that you ought not to assess his actual damages at forty thousand
118 dollars or any sum near that amount. The defendant argues to you, gentlemen, if he is entitled to recover he is not entitled to recover for a permanent injury, but only for his bodily

and mental suffering caused by the blow upon his head, his loss of time, and his inability to work during the time that he probably lost from his employment.

Now, where is the truth about it, gentlemen? It would be your duty first to ascertain his actual damages, what his actual damages are, and after ascertaining his actual damages, gentlemen, before answering this fourth issue you must pass upon another question, because there are two questions involved in this issue. That other question you are to pass upon is whether or not the plaintiff has been guilty of contributory negligence, and whether that contributory negligence concurred proximately in causing the injury to the plaintiff.

The burden is upon the defendant, gentlemen, to show contributory negligence upon the part of the plaintiff, and to show it by the greater weight of the evidence, and if the defendant has shown, gentlemen, that the plaintiff by his own negligence contributed to his injury, and shown that by the greater weight of the evidence, it will be your duty, gentlemen, to ascertain the allowance or the deduction that you will make from his actual damages on account of his contributory negligence. This action is brought under what is known as the Employers' Liability Act, a Federal statute passed by Congress, and it provides that: "The fact that the employee may have been guilty of contributory negligence should not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee."

Contributory negligence is the negligent act of the plaintiff, which concurring and co-operating with the negligent act of the defendant is the proximate cause of the injury.

The Court charged you in the beginning, gentlemen, that if you found the facts to be true as testified to by the witnesses, that
119 the proper way to operate the lever in question was to stand with your side to the engine and facing either the front or rear of the engine, and to operate this lever with one hand, and if you find that to be true, gentlemen, and the defendant has shown by the greater weight of the evidence that at the time the plaintiff was injured he was not attempting to operate this lever in that way, but that he stood facing the lever with his head over it and took hold of it with both hands for the purpose of opening the ash pan or operating the lever, the Court charges you that that would be negligence upon the part of the plaintiff, and if you further find from the greater weight of the evidence that that negligence contributed to the plaintiff's injury, concurred with the negligence of the defendant company, and was the proximate cause of the plaintiff's injury, then the Court charges you that the damages that the plaintiff would be entitled to recover should be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff.

If you should find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury

in proportion to the amount of negligence attributable to the employee. So if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant, and if the defendant has shown by the greater weight of the evidence that the plaintiff was guilty of contributory negligence as explained to you by the Court, then you should make such allowance, gentlemen, therefore, in reduction of plaintiff's damages as you may deem right and proper. Now, upon this question the Court further charges you:

120 If you find the defendant liable, you should first consider the question of damages without regard to the question of contributory negligence upon which the defendant relies. That is, you should first determine what amount plaintiff would be entitled to recover in the absence of any contributory negligence on the part of the plaintiff.

If you find under these facts, under the greater weight of the evidence, that the plaintiff was guilty of contributory negligence, then it would be your duty to reduce the amount of the recovery in proportion.

The statute under which this suit is instituted provides that damages should be diminished in proportion to the amount of negligence attributable to the employee; that means if you find that the negligence of the two is equal, that the railroad company was guilty of negligence and the plaintiff was guilty of equal negligence that contributed to the injury, then you should reduce the damages one-half.

If you find that the plaintiff was guilty of more negligence than the railroad company was, then the damages should be reduced more than one-half; if he was guilty of less negligence than the railroad company was, the damages should not be reduced as much as one-half. You should make the amount of your verdict vary with the proportion between the negligence of the plaintiff and the negligence of the defendant, if you find that the defendant was guilty of negligence and that the plaintiff was guilty of contributory negligence.

Now, gentlemen, under these instructions and under the testimony, if you ascertain the actual damages that the plaintiff has sustained on account of this injury caused by the negligence of the defendant—I say if you have ascertained that under the evidence and under the rule heretofore given you by the Court, then, if you find that the plaintiff was guilty of contributory negligence as heretofore explained to you by the Court, then you will proceed to ascertain what amount you will allow as a reduction of

121 diminution of the damages which you have found the plaintiff to have sustained, and the difference between the amount that you have ascertained, gentlemen, to be his actual damages, and the amount that you find ought to be deducted from

that amount on account of his contributory negligence, would be your answer to the fourth issue.

Upon the question of contributory negligence, gentlemen, the defendant contends that you ought to find that the plaintiff on this occasion was guilty of contributory negligence, and that that negligence was the proximate cause of the plaintiff's injury. That Hairston and Williams both testified that he was attempting to operate this lever with both hands; that he had ascertained that he could not operate it with one hand, and that he was attempting to operate it with both hands, and while in that position the lever kicked and struck him in the forehead, and that he was not operating it in a safe way, and that he is guilty of contributory negligence, and that you ought to so find.

Whereas, the plaintiff contends you ought not to find; that you ought not to find that he was guilty of contributory negligence, and the plaintiff argues to you that he was not attempting to operate this lever at all; that if he was, that he was attempting to operate it in a proper way, and that he was not guilty of any negligence in doing so, but that the only negligence in the case was the negligence of the defendant company, and not his negligence.

These are questions for you, gentlemen.

The plaintiff, gentlemen, has introduced the following witnesses who testified in the case:

The plaintiff himself has gone upon the stand and testified. He introduced John Perry, colored, a boy who said he saw the accident. Professor Flick testified as to the condition of the plaintiff before the accident and after the accident. Mr. Dorsett testified as to the general character of the plaintiff and of the witness Perry. Dr. Dodson was introduced as an expert and testified in his
122 opinion, if the jury should find that he was injured as indicated in the questions that were asked him, that plaintiff's injury would be permanent. Also Mrs. Lloyd, who testified that her husband prior to the injury was a man of good spirits and good health; was strong and healthy, and able to do his work; that since then he is not able to do anything; that he continues to suffer, and tells about how he suffered during the time before the wound healed up, and how he has suffered since, and that the difference between him now and before is the difference between him as a young man and as an old man.

The defendant introduced Colonel Henderson, who testified about the deed that was made to the Southern Railway Company for the property upon which the shops at Spencer are located. He further testified that the place of injury of the plaintiff was off of the right of way of the North Carolina Railroad. Then I call your attention to the testimony of Mr. Frick. Also of Mr. Williams. The testimony of Chas. Hairston, and also the testimony of Mr. Shuping and Mr. Walter Rusher; George Murray; Mr. Fuller, the shop superintendent, and Mr. Neighbors; Mr. Sasser. Also the testimony of Mr. Chandler, Mr. Younce, Mr. Heilig, and Mr. Owen, who testified that he took the ash pan off of 579 either the evening after it made the trial run, or in the morning before it started out on its regular

work. Dr. Whitehead testified that he was the one that performed the operation; tells you what he found; that it was a concussion of his brain, and a profound impression made, but that the inner table of his skull was not fractured, and he tells how it was broken upon the outside. He further testified that for four or five days that he was semi-conscious; that then he recovered and regained his consciousness; and he further testified, gentlemen, about his having neurasthenia, and with the exception of that, in his opinion, he was not permanently injured, and that he thought he would finally recover of this, and that in his opinion it is not a permanent injury.

123 Dr. Brawley testified that he examined the plaintiff's eyes before and after the accident. He says that he was employed by the railroad the last time that he made the examination; that Dr. Whitehead sent the plaintiff to him, and that he examined him, and that he found his eyes practically in the same condition before and afterwards. Dr. Michaux was introduced, and says that he treated the plaintiff two or three times, dressed just the outer wound, and the question was asked of him, and he says that if the jury should find the facts to be as stated in the question, in his opinion, it is not a permanent injury.

Now, gentlemen, in passing upon these questions you will consider all of the evidence, whether the Court has called it to your attention or not. You will consider the argument of counsel based upon the evidence. It is immaterial what the counsel for either side may think about this case, or what they may want you to do. The question is, what do you find from the evidence. You find the facts from the evidence and apply the rules of law given you by the Court to the facts as you may find them, and answer the issues accordingly. You can believe all that a witness says, or you can believe a part of it and reject a part of it, or you can reject it all if you don't believe it. You are the exclusive judges of what weight you will give to the testimony of the witnesses in determining the character of the witness, his interest in the matter in controversy, if he has any, the reasonableness or unreasonableness of his testimony, the probability or improbability of it, and the opportunity he has had for knowing what he is testifying about.

Dr. Bowman, when he was upon the stand, upon cross-examination, said that he signed a certain paper. That paper was introduced in testimony, but he says that his statements were not taken down in that paper like he gave them to the agent of the railroad company when he came over and asked him these questions. You will understand, gentlemen, that this paper writing offered is not substantive testimony. It is offered for the purpose of enabling you to

124 determine what weight you will give to the testimony of the witness, whether or not you will believe what he said here upon the stand. His testimony upon the stand is substantive evidence, but this statement that was offered for the purpose of contradicting him is not substantive evidence, but can only be considered by the jury in the way that I have indicated to you. The same thing is true of the witness Williams. He admitted that he signed a statement, and that statement was introduced in evidence,

but he has gone upon the stand and testified, and his testimony upon the stand is substantive evidence, but this evidence contained in this statement, no part of it is substantive evidence. It is only admitted for the purpose of enabling you to determine whether or not you will believe that he testified upon the stand now—to contradict and impeach the witness.

Of course, gentlemen, you will try this case fairly, just like you would try any other case, and as if you were trying a case between two individuals. If you have any sympathy or prejudice either for the plaintiff or against him, or for the defendant or against it, it is your duty to divest yourself of this sympathy and this prejudice and to try this case under the evidence and according to the rules of law given you by the Court.

COURT: Are there any further questions you desire me to charge the jury on, gentlemen?

COUNSEL: No, sir.

COURT: Do you want me to read over my notes of the evidence to the jury?

COUNSEL: No, sir.

To the charge of his Honor the defendant, Southern Railway Company, excepted.

Ninth exception.

The jury answered the issues as set out in the record and assessed the damages of the plaintiff at twelve thousand five hundred
125 dollars. The defendant, Southern Railway Company, entered a motion for a new trial. Motion overruled, and the defendant excepted.

Tenth exception.

The Court signed judgment as appears in the record, to which the defendant, Southern Railway Company, excepted, and gave notice of appeal to the Supreme Court. Notice waived. Appeal bond fixed in the sum of fifty dollars.

Eleventh exception.

(The clerk will copy the summons, pleadings, petitions, and bonds for removal, order declining removal, order of removal, issues, judgment, and all court records relating to the case.)

Appellant's Assignment of Errors.

The appellant, Southern Railway Company, makes the following assignment of errors:

(1) For that the Court overruled the plea of the defendant, Southern Railway Company, to the jurisdiction of the Court to try the cause and its objection to the trial by the Superior Court of Guilford County. (Defendant's first exception.)

(2) For that the Court declined the motion of the defendant, Southern Railway Company, made at the close of the plaintiff's

testimony to dismiss the case as upon nonsuit under the Hinsdale Act. (Defendant's second exception.)

(3) For that the Court declined the motion of the defendant, Southern Railway Company, made at the close of all the testimony, to dismiss the case as upon a nonsuit under the Hinsdale Act. (Defendant's third exception.)

(4) For that the Court submitted the issues as shown in the record and declined to submit the issues tendered by the defendant, the Southern Railway Company, as set out in the case on appeal. (Defendant's fourth exception.)

(5) For that the Court declined to give the following in-
126 struction requested by the defendant, Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an extra engineer in the service of the defendant, and had been in the continuous service of the defendant from June, 1910, until January, 1911, at the time he was hurt, and that on the day he was hurt he was assigned to the duty of examining and inspecting engine No. 579 and taking it out upon a trial trip in order to test the engine and its apparatus and parts to ascertain whether or not they were in proper condition and repair; and the jury further find from the evidence that the engine had been in the shops for repairs and had been repaired and that the nuts upon the ash pan damper which controlled the operation and adjustment of the lever had not been properly adjusted, then it was the duty of the plaintiff to see that they were properly adjusted, and if the jury find that the injury was caused by the improper adjustment of said nuts, this would not be negligence on the part of the defendant for which the plaintiff could recover, and the jury should answer the first issue "No." (Defendant's fifth exception.)

(6) For that the Court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that it was the duty of the plaintiff to examine, inspect and test the engine for the purpose of ascertaining whether or not it was in serviceable condition, and in order to discover whether or not it had been properly repaired, and he was injured by reason of a failure to adjust any part of the engine which it was his duty to inspect and adjust or report its condition, then the defendant would not be liable for any injury he sustained on account of the improper adjustment of such part; and if the jury further find that his injury was caused by the failure to adjust such machinery, which it was his duty to inspect and test, then the jury should answer the first issue "No." (Defendant's sixth exception.)

127 (7) For that the Court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the lever to the ash pan damper had been so adjusted by means of the nuts that it was too tight for ordinary use and service, and that the plaintiff undertook to operate the lever and pulled upon it with his hands and stood in

such a position that his head was immediately over the lever, and that by reason of his pulling it loose from its fastening it flew up and struck his face, this would not be the negligence of the defendant as alleged in the plaintiff's complaint, and the jury should answer the first issue "No." (Defendant's seventh exception.)

(8) For that the Court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an employee of the defendant as an extra engineer without any regular run or assignment, but that he belonged to the division which extended from Spencer, North Carolina, to Monroe, Virginia, and that occasionally he worked upon an engine running from North Carolina into Virginia, and the jury should find from the evidence that engine No. 579, upon which he was injured, was ordinarily used in carrying trains from Spencer, North Carolina, to Monroe, Virginia, carrying freight or passengers between the two States; and the jury should further find that on the day the plaintiff was injured he was assigned to the duty of taking engine No. 579 from the shops in Spencer, North Carolina, to Barber Junction or Elmwood, North Carolina, both points being within the State of North Carolina, and it not being necessary to go outside of the State of North Carolina, without cars, either freight or passengers, attached, or without carrying passengers or freight of any kind, then the plaintiff, at the time he was injured, was not engaged in interstate commerce." (Defendant's eighth exception.)

128 (9) For that the Court charged the jury:

"If they found the facts to be true as testified by the witnesses in the case they would answer the second issue "Yes." (Defendant's ninth exception.)

(10) For that the Court erred in charging the jury as set out in that portion of the charge marked "A" "B," to wit:

"The Court charges you that if you find the facts to be as testified to by the witnesses, you will find that the proper way to operate the lever in question was for the operator to stand facing either the front or the rear of said engine, and to operate the lever with one hand, and if you find this to be true, the Court charges you that if you further find from the greater weight of the evidence that the lever in question was adjusted so tightly that it could not be operated with one hand by one standing facing the front or rear of said engine with reasonable safety to himself, that this would be negligence upon the part of the defendant, and you should so find; and if you should further find from the greater weight of the evidence that the plaintiff tried to operate said lever while so adjusted, and was injured thereby, and that said negligence was the proximate cause of the plaintiff's injury, you will answer the first issue 'Yes.' And by proximate cause, I mean the nearest or direct cause of the injury. But if the plaintiff has failed to show these facts by the greater weight of the evidence, you will answer the first issue 'No.' Or, if you should find from the evidence that the appliance in question was so adjusted that it could be operated with one hand by a person standing in the position above indicated, that is, facing either to

the front or to the rear of the engine, with reasonable safety to himself, you will answer the first issue 'No.' " (Defendant's tenth exception.)

(11) For that the Court signed the judgment as appears in the record. (Defendant's eleventh exception.)

129 It is agreed that the above case shall constitute the case on appeal to the Supreme Court.

This March 10, 1914.

WILSON & FERGUSON,
Attorneys for Appellant.
A. L. BROOKS,
Attorney for Appellee.

Appeal bond filed and approved March 18, 1914.
M. W. GANT, *C. S. C.*

Clerk's Certificate.

NORTH CAROLINA,
Guilford County:

In the Superior Court.

I, M. W. Gant, Clerk of the Superior Court in and for the county and State aforesaid, do hereby certify the foregoing to be a true and correct transcript of the record of the case entitled "W. L. Lloyd v. Southern Railway Company and the North Carolina Railroad Company," as appears of record in this office.

In witness whereof I have hereunto set my hand and official seal.

Done in office at Greensboro, N. C., this the 18th day of March, 1914.

[SEAL.] M. W. GANT,
Clerk Superior Court Guilford County.

130 *Docket Entries.*

Appeal docketed, March 26th, 1914. Argued April 30th, 1914. Opinion by Walker, J., May 25th, 1914, as follows:

131 Supreme Court of North Carolina, February Term, 1914.

#402.

W. L. LLOYD
v.
SOUTHERN RAILWAY COMPANY et al., Appellant.

Guilford.

This is an action to recover damages for injuries alleged to have been caused by defendant's negligence. The case was before us at

a former term, and is reported in 162 N. C. 485. Several of the questions now presented were then decided adversely to the defendants, and we will not consider them again upon a second appeal. Latham v. Fields, at this term. We held before, that the cause was not removable to the Federal Court. Defendant, when the case was called for trial, entered a plea to the jurisdiction, based upon the ground, that at the former trial, the lower court had ordered the case removed, and that in compliance with said order, a true transcript of the record in the case, properly certified and accompanied by a sufficient bond, had been filed and the case docketed for trial in the Federal Court. But it appears, that when the court ordered the removal, an exception to the order was reserved by the plaintiff, who brought the matter to this Court for review by appeal, and we reversed the order of removal, and remanded the case for trial in the court below. The case accordingly proceeded to trial and resulted in the following verdict: "1. Was the plaintiff injured by the negligence of the defendant, the Southern Railway Company, as alleged in the complaint? Answer: Yes. 2. Was the plaintiff at the time of receiving such injury engaged as an employee of the Southern Railway Company in interstate commerce? Answer: Yes. 3. Was the North Carolina Railroad Company, at the time of the alleged injury of plaintiff, engaged in interstate commerce? Answer: No. 4. What damage, if any, is plaintiff entitled to recover of the Southern Railway Company? Answer: $12,500. 5. What damage, if any, is plaintiff entitled to recover of the North Carolina Railroad Company? Answer: Nothing." Judgment was entered thereon for the plaintiff, and the defendant excepted and appealed.

132 Brooks, Sapp & Williams for plaintiff.
Wilson & Ferguson for defendant.

WALKER, *J.* (after stating the case):

As to the plea of the defendant to the jurisdiction, it may be said that the mere filing of a transcript in the Federal Court and docketing the case there, did not prevent the State court from proceeding with the cause by trial and final determination in the exercise of its jurisdiction, as the order of removal was held by this Court to be erroneous and was accordingly reversed, with directions to retain the case. The plea, therefore, was properly overruled. Our decision could not be questioned or collaterally attacked in that way, but only by a writ of error to the final judgment. Herrick v. Railroad Co., 158 N. C. 307, and cases cited; Crehore v. Railway Co., 131 U. S. 244 (33 L. Ed. 144). This Court had the right to decide for itself whether the papers presented a removable case (Railroad v. Dunn, 122 U. S. 513; Stone v. South Carolina, 117 U. S. 432; Herrick's case, supra), and having held that they did not, the ruling stands until reversed in some regular and proper way.

Other questions remain for consideration. 1. Refusal of the court to submit certain issues tendered by the defendants and the adoption of others in their stead. 2. Denial of motion to nonsuit, under

the Hinsdale Act, Revisal of 1903, Sec. 539. 3. Refusal to instruct the jury, as requested by defendants. 4. Error in the instruction given, as specified in the exception thereto.

The issues tendered by the defendant, the Southern Railway Company, were as follows: "1. Did the plaintiff contribute by his negligence to his own injury, as alleged in the answer? 2. How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him? 3. What sum should be deducted from the damages sustained by the plaintiff as the pro-
portion or just share thereof attributable to the negligence
133 of the plaintiff?" The court properly refused to submit these
issues, as contributory negligence was not a defense or bar to the action under the Federal Employees' Liability Act, but could be considered only on the inquiry as to the damages. No separate issue was necessary for this purpose. The Act expressly provides: "The fact that the employee may have been guilty of contributary negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The entire question of contributory negligence is to be considered by the jury in assessing the damages. Thornton on Employers' Liability Act, p. 101 and sections 68 and 69. There would be no advantage in a separate issue as to contributory negligence, as an answer to it, one way or another, would not enable us to determine whether the jury had correctly estimated the damages. It is not at all usual to allow a specific issue as to each distinct element of damages, but they are all considered under only one issue. If the court instructs erroneously as to any particular element, it may be reviewed upon proper exception.

There was no error in overruling the motion to nonsuit the plaintiff. The evidence tended to show negligence on the part of the defendant in assigning the plaintiff, as engineer, to operate a defective engine, which he did not know was out of order. Upon a motion of this kind, the evidence is construed most favorably for the plaintiff, and he is entitled to have considered every reasonable inference therefrom. Brittain v. Westhall, 135 N. C. 492; Freeman v. Brown, 151 N. C. 111. If the evidence is thus treated, and having regard to what the plaintiff himself testified, we find that he said: "The proper way to handle the lever of an ash pan and the safe way, is to go to the side of the engine, on the left side; go to the side of the engine with your face the way the engine was front-
ing, and stoop down and catch hold of the lever and pull it;
134 that would be the natural way and that would be the proper
way. When you pull the lever up in that way, your body would go with it. I can't say that there was no danger in handling these that way to the person operating it; there is danger to them any way you handle it, there is danger to the person operating it no matter how you handle it, if you take one improperly adjusted; they are universally known to be dangerous if they are not properly adjusted—anybody can tell you that. If properly adjusted you can handle them any way you want to and not hurt you." He fur-

ther testified that the defect was in the mechanism of the lever extending from the shaft to the damper, and was due to the tightening of the nut on the rod, which caused it to form a spring, and that, when he was examining the ash pan, it flew out and struck him on the forehead, knocking him senseless. The engine had just come from the repair shop, and was presumed to be in good order, though it was his duty, as engineer, to inspect it and ascertain if it was in serviceable condition for its regular run from Spencer, N. C., to Monroe, Va. He was not aware of any defect in the lever or its attachments and was only "looking between the ash-pan and firebox, to see if the grates were intact." If the engine was defective, it was his duty to report it, so that it could be returned to the shop for repairs. He testified: "A part of my duty on that day would have been to inspect and examine this engine before returning it to the shop. I had to make an inspection before carrying it out, to see that it was in condition to carry out; that was the purpose of the trip, to see if it was in proper condition and make it so. * * * I knew from reputation beforehand if the lever was not properly adjusted that it was dangerous; I had never handled one in my life. I had handled engines of that character with levers from June until January; I know I had some engines equipped that way; I don't know whether all of them were, because it was not in my line of business to have anything to do with the damper; that came in the fireman's line and hostler's; I never had to clean fire or assist in doing it; it was my duty to inspect the engine, the machinery of it. It was my duty, and I say in my complaint, to ascertain whether or not that engine was in serviceable condition to go out on that trip; that was the very purpose of taking the engine out at all, was to take it out to see whether it was in serviceable condition. Anything that would be wrong or unserviceable, of course, I would be expected to report, and if I had not gotten hurt with that damper and had investigated it, it would have been my duty to report it to the foreman to be properly adjusted, which I would have done if I had not been hurt." It is evident from this statement of his, that he did not intend to say that he was to re-adjust or repair the engine, if found to be out of condition, but merely to inspect and if any defect was discovered there, to report it. There was ample evidence of the defective condition of the engine in respect to its damper and the lever that controlled it. The plaintiff was not ordered to repair a known defect in the engine, in which case he would, of course, assume the risk. The case, therefore, does not fall within the rule laid down by us in Lane v. Railway Co., 154 N. C. 9, where it was the employee's duty to repair a broken door, and in White v. Power Co., 151 N. C. 356, where he was sent to repair a wire that fed a lamp with an electric current, which had failed in some way. We there referred to Spinning Co. v. Achord, 84 Ga. 14 and 16, in which Chief Justice Bleckley gave the homely but apt illustration that the physician might as well insist on having a well patient to be treated and cured by him as the machinist to have sound and safe machinery for him to repair, and he added, "the plaintiff was called to this machinery as

infirm, not as whole." But it was not so in this case. Plaintiff was not assigned to repair any break in this engine. It had just come from the repair shop and was supposed to be in good order and free from any defect. His duty was to inspect merely and try
136 out the engine, shake it down, so to speak, to see if it was ready and fit for its run that day or the next from Spencer to Monroe. It is true that he was searching for defects, but if he found any, his duty was to report, as he says. We do not think that in this respect he assumed the risk. It was the duty of this company to exercise ordinary care in providing a reasonably safe place for him to work and reasonably safe tools and appliances with which to perform it. Marks v. Cotton Mills, 135 N. C., 287, where we said: "The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. * * * The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee, and he must bear the loss, it being damnum absque injuria; but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employees. To the extent that he fails in this plain duty he must answer in damages to his
137 employee for any injuries the latter may sustain which are proximately caused by his negligence." Our latest expression on the subject is in Lynch v. Railroad Co., 164 N. C. 249: "We have said in numerous decisions that the master owes the duty to his servant, which he cannot safely neglect, to furnish him with proper tools and appliances for the performance of his work, and he does not meet fully the requirement of the law in the selection of them unless he uses the degree of care which a person of ordinary prudence would exercise, having regard for his own safety, if he were applying them for his own use. Marks v. Cotton Mills, 135 N. C. 287; Avery v. Lumber Co., 146 N. C. 595; Mercer v. R. R., 154 N. C. 399. The master should, in the exercise of such care, provide reasonably safe tools, appliances and surroundings for his servant while doing the work. Dorsett v. Manufacturing Co., 131 N. C. 254; Witsell v. R. R., 120 N. C. 557; Orr v. Telephone Co.

132 N. C. 691." And to these citations may be added, Pigford v. Railroad Co., 160 N. C. 93; Mincey v. Railroad Co., 161 N. C. 467; Kiger v. Scales Co., 162 N. C. 133. In the Mincey case, we said: "The duty of the master to provide reasonably safe tools, machinery and place to work, does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. R. R. v. Herbert, 116 U. S. 642; Gardner v. R. R., 150 U. S. 349; R. R. v. Baugh, 149 U. S. 368; Steamship Co. v. Merchant, 133 U. S. 375. This
138 undertaking on the part of the master is implied from the contract of hiring (Hough v. R. R., 100 U. S. 213), and if he fails in the duty of precaution and care, he is responsible for an injury caused by a defect, which is known to him and is unknown to the servant. R. R. v. McDade, 135 U. S. 554." The Federal Employers' Liability Act has adopted the same rule, as it provides that the employer shall be liable for injury or death of the employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." Whether the defendant knew of the defective adjustment of this lever with the ash-pan damper, or in the due exercise of care should have known of it, before it left the repair shop, which, in law, is the same thing, was a question for the jury upon the evidence, and it was so submitted by the court. There was sufficient evidence of negligence in causing or permitting the defect to exist. If the least degree of care had been used in the shop, it could have been removed and the consequent injury prevented. The presiding judge, in his charge, required a finding of such negligence by the jury before giving an affirmative answer to the first issue. He instructed the jury, on this point, as follows: "This is not a case in which you can infer negligence from the simple fact that the plaintiff was injured, as contended by him; but the burden is upon the plaintiff to show by the greater weight of the evidence that the defendant company was negligent, as alleged. The negligence alleged is that the machinery used upon engine 579 for controlling the ash-pan damper was defective in that it was adjusted so tightly that it made it unsafe to operate the lever in raising and lowering said ash-pan upon this occasion." He also properly left the acts and conduct of the plaintiff in handling the lever, if he did so,
139 to be considered by the jury on the issue as to damages, his negligence, if any, being contributory, and his charge, in this respect, was a compliance with the Act of Congress, which provides: "The fact that the employee may have been guilty of con-

tributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee." Before leaving the question of negligence, we should remark, that defendant has assigned error in the charge and refusals to charge, it being its fifth, sixth and tenth assignments, but nowhere in the brief are they discussed, as is required by the rule of this Court, 164 N. C. 551, Rule 34: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." The fifth, sixth and tenth assignments are not considered or discussed separately in the brief, as they should be, if relied on, but only as parts of a group of assignments, viz: "The second, third, fifth, sixth and tenth assignments of error present practically the same question to the Court. Whether, under the facts in this case * * * he can recover for an injury caused by the fact that the engine was not properly adjusted in the shops." The assignments, as thus presented, are faulty, in that it is assumed, as will appear from them when read in full, that plaintiff's duty was not only to "inspect," but to repair or "adjust" the engine, if defective, whereas he testified that his duty was to "inspect" and "report." But the assignments as stated, embracing five of them, relate only to the right to recover at all, and this question had been fully considered under the assignment to the refusal of a nonsuit. Under the rule, they cannot be otherwise considered here.

The seventh assignment to the refusal of the court to give an instruction, cannot be sustained, as the facts recited therein would not, if found by the jury, defeat plaintiff's recovery, but are properly referable to the question of damages.

140 The eighth and ninth assignments raise the question, whether plaintiff, at the time of the injury, was engaged in interstate commerce. He was put in charge of this engine, and his duty as engineer required him to inspect it for the purpose of ascertaining whether it was in proper condition for its run from Spencer, N. C., to Monroe, Va. It was in commission for the purpose of moving interstate traffic between those two points. It was not necessary to constitute it an instrument of interstate commerce that it should have started on its journey. This engine was to be employed wholly in interstate commerce and has been so used since the day of the injury. The work of reparation had been finished in the shops and the engine was run out on the track, preparatory to her next interstate run. She had been thus used before and her runs were merely suspended temporarily for the purpose of repairing her, after which the interstate runs would be resumed. Plaintiff was overlooking his engine, expecting to take it out that day or the next to Monroe, Va. His work was done only in a preparatory stage of interstate commerce, but was a part of it. The case, in this respect, is governed by N. C. Railroad Co. v. Zachary, 232 U. S. 248, where the Court says: "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his

employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant," citing Pedersen v. D. L. & W. R. Co., 229 U. S. 146; St. L. S. F. & T. R. Co. v. Seale, 229 U. S., 156. In this connection, the testimony of the defendant's witness, H. J. Heilig, becomes pertinent: "Engine
579 is now running between Spencer, N. C., and Monroe, Va.;
141 has been since the injury in regular service; may have been off for a few days at the time for local repairs; it was running between those points before the injury; one of the train engines operating between Spencer and Monroe; it was hauling commerce between the two States, between Spencer, N. C., and Monroe, Va." The trip to Salisbury, or to Barber's Junction, was for the purpose of testing the sufficien-y of the engine to make the run and was but a part of the work of inspection and preparation. Illinois Central R. Co. v. Behrends, —— U. S., ——, was a case where the carrier and the employee were both, at the time of the injury, engaged in intrastate commerce, and although the engine in question was soon to be coupled to interstate cars, it was then hauling intrastate freight, and the Employers' Liability Act was held not to apply.

For the reasons stated, we hold that the defendant, Southern Railway Company, at the time of the injury, was engaged in interstate commerce, and plaintiff was employed by it in such commerce, so as to make the Federal Employers' Liability Act applicable to the case. The same reasoning applies to the North Carolina Railroad Company, lessor of its co-defendants, as it authorized and is responsible for the latter's acts under its lease, and is, therefore, engaged in commerce between the States, being itself a common carrier. The case of N. C. R. Co. v. Zachary, supra, also disposes of this point, for it was there held that the N. C. R. Company was liable under said Act as an interstate carrier, under facts and circumstances similar to those shown in the record.

The defendant did not plead assumption of risk, nor was any issue relating thereto tendered by it, or submitted by the court. This is necessary, under our practice and procedure, in order to raise that question, as we regard it as a distinct defence, which must be pleaded and an issue thereon tendered by the defendant or submitted by the court of its own motion. Dorsett v. Manufacturing Co., 131 N. C.
254; Eplee v. Railroad Co., 155 N. C. 293; Bolding v. Rail-
142 road Co., 123 N. C. 614; West v. Tanning Co., 154 N. C. 44.

It may be well to refer to one other matter. The petition to remove the case to the Federal Court, because of the diversity of citizenship, as between the plaintiff and the defendant, Southern Railway, and the alleged fraudulent joinder of the N. C. R. Company, a domestic corporation, was rightly denied, as a general allegation of fraud is not sufficient. There are no facts alleged, which if found to exist, would constitute a case of fraudulent joinder. The petition, on its face, must be sufficient in this respect to raise the issue, and if it is, then the issue would be tried in the Federal Court.

But the State court must first pass upon the sufficiency of the petition and decide for itself if it states a case for removal, before it is required to surrender its jurisdiction. Lloyd v. Railroad Co., 162 N. C. 485, and authorities cited; Herrick v. Railroad Co., 158 N. C. 307; Hough v. Railroad Co., 144 N. C. 692; Rea. v. Mirror Co., 158 N. C. 24. If we hold that the N. C. Railroad Company was properly joined, being liable as a joint tort feasor, by reason of the use of its main tracks, with the siding, in interstate traffic, there could be no fraudulent misjoinder, as a plaintiff is entitled to join all who are liable to him for a joint tort, or to select among them whom he will sue. Hough v. Railroad Co., supra. It was said in that case: "The plaintiff, or party aggrieved by the wrong, may make it joint or several, at his election, and it is not open to the wrongdoer to complain of the election so made or to dictate how he shall make his choice. If the injured party chooses to sue the wrongdoers jointly he thereby declares that the tort shall be joint, and the law so regards it, without listening to or even hearing from the wrongdoer. And so it is when he sues them separately. His election finally determines what shall be the character of the tort, whether joint or
143 several. This principle has controlled the courts in deciding upon applications for the removal of causes from the State to the Federal courts whenever it becomes necessary to inquire whether a separable controversy is presented as between the plaintiff and the non-resident defendant, or opposite party, or diverse citizenship." A strong authority is Torrence v. Shedd, 144 U. S. 527, in which Justice Gray thus tersely stated the rule: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleading." The domestic corporation cannot lease its railway and permit its physical connection at both ends with other tracks laid by its lessee, for the more convenient and practical use of the latter's main line acquired from the lessor, without being responsible for torts committed in the use of such lateral or side tracks. The construction of such tracks was manifestly contemplated by the parties to the lease, and what is authorized, expressly or by necessary implication, makes him who gave the authority responsible for any illegal exercise of it. Qui facit per alium, facit per se.

We have discussed some of the questions, not strictly before us on this appeal, because it was said, in the former opinion by this Court, that they were not finally settled, and as the facts have since been more fully developed, our opinion upon them should be more definitely and conclusively stated. The intimation in its former opinion is now the final decision of the Court.

There was no error in the several rulings of the court at the last trial.

No error.

144 Supreme Court of North Carolina, February Term, 1914.

No. 402.

W. L. LLOYD
vs.
SOUTHERN RAILWAY CO. et al.

Guilford County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Guilford County.

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable P. D. Walker, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendants and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of nineteen 10/100 dollars ($19.10), and execution issue therefor.

145 *Authentication of Record.*

SUPREME COURT,
State of North Carolina, ss:

I, J. L. Seawell, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 145, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Southern Railway Company, Plaintiff in Error versus W. L. Lloyd, Defendant in Error, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Raleigh on this 7th day of December, 1914.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 24,462 North Carolina Supreme Court. Term No. 296. Southern Railway Company, plaintiff in error, vs. W. L. Lloyd. Filed December 9th, 1914. File No. 24,462.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 296.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

versus

W. L. LLOYD, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

L. E. JEFFRIES,
JOHN M. WILSON,
H. O'B. COOPER,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., November 20, 1915.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 296.

SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

versus

W. L. LLOYD, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

1. Statement of Facts.

This is a civil action begun in the Superior Court of Guilford County, North Carolina, to recover damages for personal injury sustained by the defendant in error, W. L. Lloyd (hereinafter called the plaintiff), which was alleged to have been caused by the negligence of the plaintiff in error, the Southern Railway Company (hereinafter called the defendant), and its lessor, the North Carolina Railroad Company. The defendant is a Virginia corporation (Printed Record, p. 11) and the North Carolina Railroad Company is a North Carolina corporation (Printed Record, p. 11). The defendant leases certain lines of the North Carolina Rail-

road Company, all of which are wholly within the State of North Carolina (Printed Record, pp. 11 and 19).

This action was brought under the Federal Employers' Liability Act, and it was specifically alleged that both the plaintiff and the defendant were engaged in interstate commerce at the time of the plaintiff's injury, and the specific negligent act set out in the complaint was that the machinery controlling the lever to the ashpan damper on engine 579 was defective, in that it was improperly adjusted, rendering it liable to be tripped by the slightest jar (Printed Record, pp. 10 and 13).

In apt time the defendant filed a petition (Printed Record, p. 14) to remove the case to the Federal court, alleging in the petition, which was verified and accompanied by proper bond, that the amount in controversy exceeded the amount of two thousand dollars; that the controversy was wholly between citizens of different States, to wit, the plaintiff, a citizen of North Carolina, and the defendant, a citizen of the State of Virginia; that the joinder of the resident defendant, the North Carolina Railroad Company, was fraudulent; that the plaintiff was not engaged in interstate commerce at the time of the accident; that engine 579 was not engaged in any kind of commerce at the time of the accident, and that these allegations in the original complaint were fraudulent and false, and known by the plaintiff to be fraudulent and false, or could have been ascertained to be false by the exercise of the slightest diligence upon his part.

The specific allegations supporting the above are quoted from the petition filed in the cause, as follows (Printed Record, pp. 14 and 16):

> "Your petitioner denies that the lease from the North Carolina Railroad Company to it bears date, or was effected, on August 16, 1905, but avers the fact to be that the said lease was executed during the year 1895, and was recorded in the office of the Register of Deeds of Guilford County on August 16, 1895, in Book of Deeds 99, page 596, and was to be-

come effective for a period of 99 years from January 1, 1896; and further denies that it is operating as lessee under said lease any sidetracks or other portions of its line from Goldsboro to Charlotte, not included within the 100 feet right-of-way of the said North Carolina Railroad Company.

"Your petitioner expressly denies so much of paragraph seven of the complaint as says that 'the plaintiff accordingly as directed, took the engine which he was unaccustomed to operating, upon one of the sidetracks of the North Carolina Railroad Company's main line at Spencer,' and alleges the truth and fact to be that the cinder pit or sidetrack upon which the engine was located, at the time plaintiff was working theron, was upon land owned by the Southern Railway and upon which it has built a track, subsequent to the lease by the said North Carolina Railroad Company, said track and land being a portion of the property bought by your petitioner for its own purpose and use, forming what is known as the Spencer shops, at Spencer, N. C., said sidetracks and shops being built in the year 1897, said cinder pit or track as aforesaid being, by actual measurement, approximately 340 feet from the nearest point of the right-of-way of the North Carolina Railroad Company, it being 440 feet from the center of the right-of-way of said North Carolina Railroad Company, said right-of-way being 100 feet on either side of the main line of the North Carolina Railroad Company, which is now called the south-bound main line, the same being identical in location, and is situated 220 feet within the property of the said Southern Railway Company, enclosed by a fence forming its shops and round-house, said cinder pit being a part of the round-house of your petitioner, situate at Spencer, N. C., and used by your petitioner in the construction and repair of the engines for service over all its properties, and your petitioner further says that the cinder pit or sidetrack upon which the engine was located at the time the plaintiff received his injuries, was not the property of the North Carolina Railroad Company, nor was it a part of the line of railway and properties included in the lease as aforesaid, nor was it used by your petitioner as a part of said properties so leased.

"Your petitioner denies that the plaintiff, W. L. Lloyd, was on the 12th day of January, 1911, 'employed by the defendant, the Southern Railway Company, as engineer upon its freight trains then and there running over and along said line of road from Spencer, N. C., to Monroe, Va., and engaged in hauling interstate traffic,' and likewise denies so much of the allegations of paragraph ten of the complaint as are intended to allege that on the 12th day of January, 1911, plaintiff was employed for the purpose, or was engaged in transporting interstate commerce, and that the engine upon which plaintiff was hurt was and had been exclusively used by your petitioner in the transportation of interstate commerce; and your petitioner likewise denies the allegations of paragraph thirteen of the complaint; and avers the facts and truth in this connection to be that engine No. 579, this being the engine upon which the plaintiff was working at the time of his injury, was sent into the shops at Spencer on December 16, 1910, for overhauling and repairs, and after the conclusion of said work, it was on January 12, 1911, sent to the cinder pit as aforesaid, preparatory to being given a trial run, in order to test the sufficiency of the overhauling and repairs. The plaintiff was not assigned to any certain engine, or to any certain run, but had heretofore run engines with trains from Spencer, N. C., to Monroe, Va., and from Spencer, N. C., to Selma, N. C., and to other points, and on the day in question, to wit, January 12, 1911, the plaintiff was not engaged in, neither was he employed by your petitioner in interstate commerce, but had been directed on that day, to prepare engine 579 and was so engaged at the time of the injury for a trial trip as aforesaid, said trip to be to Barber's Junction, N. C., and return over the line of the Western North Carolina Railroad, one of the branches belonging to your petitioner, and after this engine had been given a trial trip, he was to take other engines on similar trips, and on the day in question was not to be engaged as employee of your petitioner in any other service, and your petitioner states that, after the injury to the plaintiff as aforesaid, another engineer, to wit, C. H. Chandler, took

the said engine, No. 579, and gave it a trial trip, for which service and duty plaintiff was called, to wit, he took the engine to Barber's Junction and return. Said engine was not to be, on this trial trip, attached to any train moving commerce of any kind.

"Your petitioner says that the plaintiff, at the time he received the injuries complained of was an employee of your petitioner, and not an employee of its co-defendant, the North Carolina Railroad Company, and was not, and never had been an employee of the said North Carolina Railroad Company, and that all the said facts herein set forth, with reference to the lease, the location and situation of the cinder pit and sidetrack, and the duties which the plaintiff was to perform on the day in question, were well known to plaintiff, when this action was brought and complaint filed. Your petitioner further says that, to avoid the removal of this case by it to the Federal court, the plaintiff joined the North Carolina Railroad Company, a North Carolina corporation, and falsely and fraudulently alleged in his complaint that the sidetrack upon which the engine was located at the time he was injured was, 'one of the sidetracks of the North Carolina Railroad Company's main line at Spencer,' and falsely and likewise fraudulently alleged in his complaint that he suffered injury while employed by your petitioner in interstate commerce, and falsely and fraudulently alleges that he was engaged in interstate commerce at the time of his injury, and that said engine was likewise so engaged, when, at the time said allegations were made, plaintiff well knew that they were untrue, or could, by the exercise of the slightest diligence, have ascertained the true facts in connection therewith, and your petitioner further states that plaintiff did not and does not expect to establish said allegations and did not make them for the purpose of proving them at the trial or substantiating his cause of action therewith, but made them solely for the purpose of setting up a joint cause of action against the defendants, as lessor and lessee, and to state a cause under the Employers' Federal Liability Act in order to make a case which would not be removable to the Federal court.

> "Your petitioner alleges that the plaintiff, by reason of the matters and things set forth in his complaint, has no cause of action against the North Carolina Railroad Company, and consequently has no cause of action against the Southern Railway Company as lessee thereof, for that he was an employee solely of the Southern Railway Company, and received his injuries on the premises and property of the Southern Railway Company, and while engaged in the performance of a duty entirely disconnected from and with any property which was the property of the said Southern Railway Company by reason of the lease as aforesaid."

The trial court declined to remove the case (Printed Record, p. 18), and the defendant excepted, both upon the record and in its answer, to this action of the court (Printed Record, p. 19).

At the trial of the cause at the February, 1913, term of the Superior Court for Guilford County, upon the close of the plaintiff's testimony, the court intimated that there was no cause of action against the North Carolina Railroad Company (Printed Record, p. 28), whereupon the plaintiff submitted to a nonsuit as to that company (Printed Record, pp. 24, 28, and 29). The defendant immediately filed a second petition for removal (Printed Record, p. 25), which was verified and accompanied by proper bond (Printed Record, p. 27) containing essentially the same allegations as the first petition, as above set forth, and the court granted the petition (Printed Record, p. 28), and an order was signed removing the said cause to the District Court of the United States for the Western District of North Carolina at Greensboro (Printed Record, p. 29), and an entry was made of this order upon the minutes of the State court on March 13, 1913 (Printed Record, p. 29). A transcript of said cause was made and said cause was docketed in the District Court of the United States for the Western District of North Carolina, at Greensboro, on March 14, 1913, where it still re-

mains, no motion to remand having been filed (Printed Record, p. 29).

The plaintiff excepted to the order of removal and to the order of nonsuit as to the North Carolina Railroad Company and appealed to the Supreme Court of North Carolina, which was the highest court in that State (Printed Record, pp. 24, 31, and 32). That court reversed the Superior Court of Guilford County and held that the cause should not have been removed (Printed Record, pp. 31 and 32), on the ground that the plaintiff was engaged in interstate commerce (the lower court having decided that he was not), and that the North Carolina Railroad Company should not have been nonsuited under the facts.

Lloyd *vs.* Southern Ry. Co., 162 N. C., 485.

Upon the second trial of the case, at the September, 1913, term of Guilford County Superior Court, the defendant filed a plea to the jurisdiction (Printed Record, pp. 32 and 33), setting forth a history of the case and specifically alleging that the order of removal had not been revoked, and that no motion to remand had been made, and that the case was now pending in the District Court of the United States at Greensboro. A similar plea was filed by the North Carolina Railroad Company (Printed Record, pp. 33 and 34). These pleas were overruled by the trial court (Printed Record, p. 34), and upon the trial there was a verdict and judgment for $12,500 for the plaintiff against the defendant (Printed Record, p. 30) and a verdict and judgment for the North Carolina Railroad Company (Printed Record, p. 30), which upon appeal was affirmed by the Supreme Court of North Carolina (Printed Record, pp. 85 and 93), and the case is now here by writ of error to that court.

The material facts disclosed by the evidence are as follows:

Lloyd was an engineer in the service of the defendant and was on the extra list. He had been for a time preceding his

injury engaged in hauling freight trains between Monroe, Virginia, and Spencer, North Carolina, and between Spencer, North Carolina, and Selma, North Carolina, the latter route being wholly within the State of North Carolina. He had no fixed duties and was subject to call to both freight and passenger service, to both intra and interstate work.

Lloyd himself testified as follows:

> "I was on the extra list, but I might have been called to do passenger work; I didn't do any passenger work, but might have been called on to do it, I was doing freight work (Printed Record, p. 35). * * * I operated an engine from sometime in June until January, not regular, however, as I was an 'extra' man and did not make runs every day, but just took such runs as showed up in relief work with other men on that route. I had made $52 during the month that I was hurt up to the 12th of the month. I had run from Spencer to Monroe all except one trip. I would not be positive about that: I know I went to Selma one trip; I know one or two trips I made to Monroe" (Printed Record, p. 37).

While assigned to the Monroe-Spencer run his engine, 579, was withdrawn from commerce and shopped for repairs at the Spencer, North Carolina, shop on December 16, 1910 (Printed Record, p. 15). On January 12, 1911, engine 579 was taken out of the shop, the repairs having been completed, and was left on a side track of the Southern Railway Company (Printed Record, pp. 35 and 63). Lloyd was ordered to go to this track and take this engine on a trial run to Barbers, North Carolina, a distance of eleven miles, and wholly in the State of North Carolina (Printed Record, p. 63), to see if it was in proper condition and fit to be put back into commerce, and if not to report what further work was needed to make it serviceable.

Lloyd himself testified on this point, as follows:

> "I had to make an inspection before carrying it out, to see that it was in condition to carry out; that

> was the purpose of the trip, to see if it was in proper condition and make it so. The very purpose of that trip was to make the inspection, so that I might ascertain whether it was in proper condition. That was the purpose of putting me in charge of that engine" (Printed Record, p. 38).

There were no cars of any kind attached or to be attached to this engine (see Lloyd's testimony, Printed Record, p. 40):

> "When I went to carry out that engine that morning, I had no cars attached to it; I was not carrying any freight with it at all, there was nothing hitched to the engine at all; no passenger cars and no freight cars or anything. I never moved the engine. It was not intended that I should carry out any freight, any passengers or any cars."

See testimony of witness H. J. Heilig (Printed Record, p. 63):

> "There was no freight cars attached to the engine, just two light engines; did not haul any commerce of any kind."

While looking the engine over as it stood upon the side-track of the defendant, before starting on the trial trip, he noticed fire falling freely from the grates of the ash-pan. As he stooped down to look under the engine, in order to see why the fire was falling so freely, he was struck and knocked unconscious by the ashpan damper lever, receiving the injury for which this suit was brought. According to the testimony of Lloyd and his witness, a helper, John Perry, he (Lloyd) did not touch the lever, it just tripped from some unknown cause and struck him. According to the evidence of several eye-witnesses for the defendant, Lloyd caught hold of the lever, while standing facing the engine, and jerked it up, the lever striking him in the forehead. Lloyd's testimony, and this was the sole evidence on the question of negligence, was:

> "I stooped just about in this position (witness illustrates) in order to see there, get my eyes level—that I might see the bottom of the grate and just at that time when I was in that position this lever tripped and struck me. * * * The tightening of the nut on that rod that extends from the shaft to the damper gave this lever force—made it in the nature of a spring. * * * When this nut and this lever rod is properly adjusted, it is sufficiently easy for a man to operate it safely; that has no danger when properly adjusted, as it remains closed when closed and open when open" (Printed Record, p. 35).

Also again he said:

> "I did not take hold of it; I may have touched it with my leg; I didn't touch it with my hand to my knowledge. I didn't stoop down and get hold of it at all; I didn't intend to get hold of it; I did not, so far as I was conscious of; I did not go there with any purpose to handle it. To the best of my knowledge I never touched it, never put my hand on it; I may have touched it with my leg" (Printed Record, p. 39).

Plaintiff's witness Perry testified as follows:

> "It flew up and struck him; when it struck him it killed him; he didn't have hold of it, just knocked him back off from the engine, knocked him plumb back away from it, knocked him down. I didn't see him touch the lever, didn't see him touch it nary time. I said before that I didn't know whether he touched it or not; I don't know now whether he touched it or not; it flew up and struck him, is what I said. I didn't see him touch it. If he touched it, I could have seen him" (Printed Record, p. 43).

The evidence of the defendant was that one of the repairs that had been made to engine 579 was to the ashpan damper, and numerous employees, including the man who made the repairs to the ashpan damper the morning of the accident, and the men who examined engine 579 immediately after

the accident, testified that it was not defective in any way; that the lever was properly adjusted both before and after the accident; while it worked a little tight, it was easily operated with one hand.

We quote from the testimony of various witnesses as follows:

J. M. Frick, witness for defendant, testified (Printed Record, p. 47):

> "The engine, No. 579, came in and she was in need of repairs, came in for repairs to the roundhouse, and I was there to look out and see if there was anything wrong on the pan and to repair it; of course it was burnt and warped a little, the back end of the ashpan and damper, and I cut it loose and taken it up in the shop and straightened it and brought it back and bolted it back as it should be to its position; bolted it and adjusted it; bolted the damper and adjusted the rod. That is all I done to it. When I got through with it, it was in good condition, first-class condition, just as good as I or any other man could put it in. I operated it; it operated all right, first-class condition."

S. J. Shuping, witness for defendant, testified (Printed Record, pp. 55 and 56):

> "I was in the employment of the Southern Railway Company at the time Mr. Lloyd was injured; I was a cinder-pit foreman; my duty was to check all engines that came in and get the time they came in on the pit and how long they stayed on; take out the ashpans and see that the fires were properly cleaned and that the ashpans were O. K., see that they were properly sparked; see that the engines were properly cared for while they were on the pit; engine 579 was on the pit that day; she came on the pit, as I remember, about 11:20; she did not come right on the pit; she drove on the pit about the intermediate driver; that is about the middle of the engine part, the balance was off; I was at the lower end of the pit and had my men shovel-

ing and throwing off the dirt; as soon as the engine came on the pit, I went to it right away to see what was needed and see what was to be done so that I could get out of the way of the dirt; I went, and when I was going up to the engine I seen a machinist, or some one, a workman, come down and go down and go to work about the cylinder cocks or something on the front of the engine. I goes on up and examined the ashpan and what things were necessay to examine, and seen that the engine was just fired and nothing in the ashpans. At that time the ashpan and lever were all O. K. I seen the whole ashpan, lever and all; they were in good condition. * * * I saw the lever operated just afterwards (the accident); it was inside of five or ten minutes afterwards; it operated all right; it was a little bit tight, operated a little bit tight, as most of them do when they come out of the shop just newly overhauled. I did not take hold of it at all as I remember; some of the men operated it and I stood looking at them operate it and seen it; it was just a little tight, but nothing out of the ordinary, just like newly overhauled ones are."

Walter Rusher, witness for defendant, testified (Printed Record, pp. 57 and 58):

"I occupy a position of boilermaker's helper for the Southern Railway Company; occupied same position the day Mr. Lloyd was injured; I helped Mr. Frick straighten the damper in the back of the engine that day and put it in good condition; the work was done at the roundhouse; the engine was in the roundhouse for repairs; we cut the back damper off and took it up to the shop and straightened it and bolted it back on, and put the rigging back in first-class condition. It operated all right, I could operate it with one hand; it operated like all the rest of them."

E. Fuller, witness for defendant, testified (Printed Record, p. 59):

"I am master mechanic for the Southern Railway Company; have been master mechanic about eight

months; I was shop superintendent at the Spencer shops at the time Mr. Lloyd was injured; I went down to where Mr. Lloyd was injured; I suppose about ten minutes after he was injured; I was notified by the roundhouse that some one had been hurt at the cinder pit, and I started to see who it was; going over there to see, I came across Mr. Neighbors, and he was also on the way over there, and we went together; when we got up there they had taken Mr. Lloyd over to Dr. Monk's office, and the engine was just standing then at the same place it was when he was hurt; I examined the damper and rigging to see if there was anything wrong with it; I could not find anything wrong with it; I went around on the side of the engine and took hold of the lever and it was closed: I pulled it up a few times and then the other way; it was a little tighter than that; it was a little tighter than this, worked a little bit tighter and a little bit harder to pull up than this, but easily handled with one hand; I took hold of it with one hand; it was in good condition; I found nothing wrong with it at all, it operated just as they all operated; no difference in that and any of the others."

H. P. Neighbors, witness for defendant, testified (Printed Record, p. 60):

"I am general foreman at Greensboro for the Southern Railway Company; been working for the railway company ten years; I was roundhouse foreman at Spencer when Mr. Lloyd was injured; I went to where Mr. Lloyd was injured about ten minutes after his injury; I met Mr. Fuller going down there, we went down together; Mr. Fuller and I examined the ashpan; he operated it and I operated it; about that time Mr. Sasser walked up; it was in good condition; operated like all the rest; operated in a proper manner."

E. C. Sasser, witness for defendant, testified (Printed Record, p. 61):

"I am master mechanic at Spencer; occupied the same position when Mr. Lloyd was injured; I was

notified probably about fifteen minutes after Mr. Floyd was injured; I went to the engine and met Mr. Fuller and Mr. Neighbors: I examined the ashpan damper; I made a thorough examination, and I opened it and closed it; operated it and found it in good working condition; I could not find any defect that would necessitate any further repairs; it was in adjustment; it was in good first-class working condition in every respect."

C. H. Chandler, witness for defendant, testified (Printed Record, p. 64):

"I first saw it that evening about 1 o'clock, when I was called; it was in good condition at that time, when I carried it out that evening it was in the same condition when I first saw it; it operated just like all the rest of the engines; I did not examine it, but there was a machinist examining it when I came up, and it was examined in my presence; it was 1 o'clock when I came to the engine; we left on the trip a little after 2; I was right at the engine until I left; I saw the examination of the engine when I came up to the engine about 1 o'clock; I stayed with the engine until I carried it out; it was in the same condition when I carried it out as it was when I came up to it; the ashpan and damper was operated in my presence; I was standing in three feet of them the whole time; it was in good condition."

Mr. Younce, witness for the defendant, testified (Printed Record, p. 65):

"I have had about twenty-five years in railroading; been working for the Southern about fifteen years as engineer; working for the Southern as engineer now; cannot say positively that I saw engine 579 on the day Mr. Lloyd was hurt; I saw the engine at the roundhouse; I was carried to the engine by the roundhouse foreman to make inspection and look over the damper rigging to see if everything was in good condition. Mr. H. B. Neighbors was the roundhouse foreman. We examined the ashpan and damper

rigging, myself and Mr. Moore in Mr. Neighbors' presence; it was in first-class condition; by first-class condition I mean it was in condition to close, keep the ashpan closed to keep the fire, keep it from throwing fire along the line of road. It was in a condition that you could handle it, you could handle it with safety."

H. P. Neighbors, witness for the defendant, recalled, testified (Printed Record, p. 65):

"No. 579 was the engine I carried Mr. Younce to examine, about thirty minutes after Mr. Lloyd was hurt; the engine was between the roundhouse and the cinder pit; we had moved it off of the cinder pit; the condition of the damper and the lever were the same when I carried Mr. Younce there as they were when I found it after the plaintiff was hurt."

And S. S. Moore, witness for the defense, testified (Printed Record, p. 67):

"I am an engineer, been an engineer for twenty-two years; run on the Southern Railway; my run is from Spencer to Monroe, Va.; I saw engine 579 on the day Mr. Lloyd was injured; about thirty minutes after he was injured; I was in the roundhouse office at the time of the injury; I examined the engine; it was in O. K. condition; I mean by O. K. that it was all right, worked all right. Mr. Neighbors asked me and Mr. Younce to go out there and examine it and he went with us, and I operated it and it worked all right; was in good condition."

The evidence disclosed that the proper way to operate the lever was to stand with the body facing the way the engine is headed, side to the engine, and when you pull up on the lever the body comes with it; that there is no danger whatever in pulling it up that way; that the lever works on a spring, and when pulled past the center it has a tendency to fly up (see testimony of Lloyd, P. R., p. 38; Frick, P. R., p. 48; Shuping, P. R., p. 56; Fuller, P. R., p. 60;

Neighbors, P. R., p. 60; Sasser, P. R., p. 61; Heilig, P. R., p. 63; Younce, P. R., p. 65; Moore, P. R., p. 67); that Lloyd was an old and experienced employee, having entered the service as fireman in 1889, being promoted to engineer in 1899 (Lloyd, Printed Record, p. 36). The accident occurred on a side track in the yard of the defendant and more than 200 feet distant from the right of way of the North Carolina Railroad (Lloyd, Printed Record, pp. 36 and 40; Henderson, Printed Record, p. 46). At no time between the stopping of engine 579 for repairs and the time of the accident was it upon the property of the North Carolina Railroad or in the custody of its employees (Lloyd, Printed Record, pp. 36 and 40).

The defendant was operating as lessee certain tracks of the North Carolina Railroad in North Carolina (Henderson, Printed Record, p. 46), and the only possible connection the latter could have with this case was that engine 579, after leaving the track upon which it was standing to make the proposed trial trip to Barbers, would have had to traverse about two miles of tracks leased from the North Carolina Railroad if it had made the trial trip (Lloyd, Printed Record, p. 40). The latter company is a non-operating company and has no rolling-stock or employees (Lloyd, Printed Record, p. 37).

2. Assignment of Errors.

The defendant made the following assignment of errors in the Supreme Court of North Carolina, as will appear from an examination of the printed record, pages 82 and 85:

> (1) For that the court overruled the plea of the defendant, Southern Railway Company, to the jurisdiction of the court to try the cause and its objection to the trial by the Superior Court of Guilford County (defendant's first exception).
>
> (2) For that the court declined the motion of the defendant, Southern Railway Company, made at the

close of the plaintiff's testimony to dismiss the case as upon nonsuit under the Hinsdale act (defendant's second exception).

(3) For that the court declined the motion of the defendant, Southern Railway Company, made at the close of all the testimony, to dismiss the case as upon a nonsuit under the Hinsdale act (defendant's third exception).

(4) For that the court submitted the issues as shown in the record and declined to submit the issues tendered by the defendant, the Southern Railway Company, as set out in the case on appeal (defendant's fourth exception).

(5) For that the court declined to give the following instruction requested by the defendant, Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an extra engineer in the service of the defendant, and had been in the continuous service of the defendant from June, 1910, until January, 1911, at the time he was hurt, and that on the day he was hurt he was assigned to the duty of examining and inspecting engine No. 579 and taking it out upon a trial trip in order to test the engine and its apparatus and parts to ascertain whether or not they were in proper condition and repair; and the jury further find from the evidence that the engine had been in the shops for repairs and had been repaired and that the nuts upon the ashpan damper which controlled the operation and adjustment of the lever had not been properly adjusted, then it was the duty of the plaintiff to see that they were properly adjusted, and if the jury find that the injury was caused by the improper adjustment of said nuts, this would not be negligence on the part of the defendant for which the plaintiff could recover, and the jury should answer the first issue 'No'" (defendant's fifth exception).

(6) For that the court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that it was the duty of the plaintiff to examine, inspect and test the engine for the purpose of ascertaining whether

or not it was in serviceable condition, and in order to discover whether or not it had been properly repaired, and he was injured by reason of a failure to adjust any part of the engine which it was his duty to inspect and adjust or report its condition, then the defendant would not be liable for any injury he sustained on account of the improper adjustment of such part; and if the jury further find that his injury was caused by the failure to adjust such machinery, which it was his duty to inspect and test, then the jury should answer the first issue 'No'" (defendant's sixth exception).

(7) For that the court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the lever to the ashpan damper had been so adjusted by means of the nuts that it was too tight for ordinary use and service, and that the plaintiff undertook to operate the lever and pulled upon it with his hands and stood in such a position that his head was immediately over the lever, and that by reason of his pulling it loose from its fastening it flew up and struck his face, this would not be the negligence of the defendant as alleged in the plaintiff's complaint, and the jury should answer the first issue 'No'" (Defendant's seventh exception).

(8) For that the court declined to give the following instruction requested by the defendant, the Southern Railway Company:

"If the jury find from the evidence that the plaintiff was an employee of the defendant as an extra engineer without any regular run or assignment, but that he belonged to the division which extended from Spencer, North Carolina, to Monroe, Virginia, and that occasionally he worked upon an engine running from North Carolina into Virginia, and the jury should find from the evidence that engine No. 579, upon which he was injured, was ordinarily used in carrying trains from Spencer, North Carolina, to Monroe, Virginia, carrying freight or passengers between two States; and the jury should further find that on the day the plaintiff was injured he was assigned to the duty of taking engine No. 579 from

the shops in Spencer, North Carolina, to Barber Junction or Elmwood, North Carolina, both points being within the State of North Carolina, and it not being necessary to go outside of the State of North Carolina, without cars, either freight or passengers, attached, or without carrying passengers or freight of any kind, then the plaintiff, at the time he was injured, was not engaged in interstate commerce" (defendant's eighth exception).

(9) For that the court charged the jury:

"If they found the facts to be as testified by the witnesses in the case they would answer the second issue 'Yes '" (defendant's ninth exception).

(10) For that the court erred in charging the jury as set out in that portion of the charge marked "A," "B," to wit:

"The court charges you that if you find the facts to be as testified to by the witnesses, you will find that the proper way to operate the lever in question was for the operator to stand facing either the front or the rear of said engine, and to operate the lever with one hand, and if you find this to be true, the court charges you that if you further find that from the greater weight of the evidence that the lever in question was adjusted so tightly that it could not be operated with one hand by one standing facing the front or rear of said engine with reasonable safety to himself, that this would be negligence upon the part of the defendant, and you should so find; and if you should further find from the greater weight of the evidence that the plaintiff tried to operate said lever while so adjusted, and was injured thereby, and that said negligence was the proximate cause of the plaintiff's injury, you will answer the firts issue 'Yes.' And by proximate cause, I mean the nearest or direct cause of the injury. But if the plaintiff has failed to show these facts by the greater weight of evidence, you will answer the first issue 'No.' Or, if you should find from the evidence that the appliance in question was so adjusted that it could be operated with one hand by a person standing in the position above indicated, that is, facing either to the front or to the rear of the engine, with

reasonable safety to himself, you will answer the first issue 'No'" (defendant's tenth exception).

(11) For that the court signed the judgment as appears in the record (defendant's eleventh exception).

It is agreed that the above case shall constitute the case on appeal to the Supreme Court.

3. ARGUMENT.

a. Case Was Properly Removed.

The plaintiff in error assigned as its first error the following:

> "For that the court overruled the plea of the defendant, Southern Railway Company, to the jurisdiction of the court to try the cause and its objection to the trial by the Superior Court of Guilford County" (Printed Record, p. 82).

This assignment of error presents squarely the question whether or not the case was properly removed to the Federal court and whether or not the State court had jurisdiction to proceed further with the trial of the case after the order of removal had been entered.

Lloyd's suit was under the Federal act and against both the Southern Railway Company, a citizen of the State of Virginia, and the North Carolina Railroad Company, the latter a citizen of the State of North Carolina. In order for the case to be properly removed, it is necessary for the defendant to establish two facts: First, that the joinder of the resident defendant, the North Carolina Railroad Company, was fraudulent, and second, that the plaintiff was not engaged in interstate commerce, for it is conceded that if he were, then the State court properly had jurisdiction.

b. The North Carolina Railroad Company Was Fraudulently Joined as Defendant.

It was fully set forth in the petition for removal (see *ante*, p. —, and Printed Record, pp. 13 and 17) and subsequently established in the evidence upon a trial of the case, that the relationship that existed between the defendant and the railroad company was that of lessee and lessor as to the certain lines of track in the State of North Carolina; that engine 579 had been repaired in the roundhouse and was, at the time of the accident, standing upon the tracks of the defendant several hundred feet distant from the track of the North Carolina Railroad Company; that this roundhouse and track had been built and constructed by the defendant subsequent to the lease between the defendant and the North Carolina Railroad Company; that the North Carolina Railroad Company was a non-operating corporation; that it had no employees nor rolling stock; that the plaintiff was an employee of the defendant; all of which will more fully appear from the statement of facts and by an examination of the record in the case.

Can it be claimed, then, that the North Carolina Railroad Company had any real connection with this suit? The Superior Court of Guilford County decided that it had not, and a jury of that county, upon a trial of the case upon its merits, decided that it had no connection and returned a verdict in its favor.

The law governing this question is well settled:

> "A civil case, at law or in equity, presenting a controversy between citizens of different States, and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the State in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy."
>
> Chesapeake & Ohio Ry. Co. *vs.* Cockrell, 232 U. S., 146, citing many cases.

A controlling decision upon the question of fraudulent joinder is that of Welcker *vs.* National Enameling & Stamping Co., 204 U. S., 176. This was a case in which an employee was joined in a suit against his nonresident employer for damages received by the plaintiff. The negligence charged by the plaintiff was the failure to provide a safe place in which to perform his work. The plaintiff charged further that the resident employee was charged with the superintendence of the plant where the accident occurred. The defendant company petitioned for the removal of the case, alleging that the resident defendant was fraudulently joined, and that he was not charged with the superintendence of the plant, but was merely a draftsman, whose work was confined to making the necessary drawings, based on the plans and ideas of others; that he had no control over the plaintiff nor any authority to give him any instructions as to the manner in which his work should be performed. The case was removed, and on motion to remand the evidence sustained the allegations of the petition for removal. The Supreme Court of the United States, holding that the removal was proper, said in its opinion by Mr. Justice Day:

> "In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court.
>
> "It is to be objected that there was no proof that Wecker knew of Wettengel's true relationship to the defendant, and consequently he could not be guilty of fraud in joining him; but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willingly closes his eyes to information within his reach. * * * While the plaintiff, in good faith, may proceed in the State courts upon a cause of action, which he alleges to be

> joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction."

So also in the case of Stone *vs.* State of South Carolina, 117 U. S., 430, it was said:

> "All issues of fact made upon the petition for removal must be tried in the circuit court, but the State court is at liberty to determine for itself whether on the face of the records, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes. If the State court proceeds after a petition for removal it does so at the risk of having its final judgment reversed if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

The Supreme Court of North Carolina itself has previously decided this question in line with the above authorities:

> "These and other authorities are also to the effect that where the petition for removal, properly verified, as in this case, and accompanied by proper and sufficient bond, has been filed in the State court and the same contains allegations of fraudulent joinder, together with full and direct statements of the facts and circumstances of the transactions, sufficient, if true, to demonstrate that there has been such fraudulent joinder of the resident defendant, in such case the order for removal should be made and the jurisdiction of the State court is at an end. If the plaintiff desires to challenge the truth of these averments he must do so on motion to remand, or other proper procedure in the Federal court; that court being charged with the duty of exercising jurisdiction in such cases must have the power to consider and determine the facts upon which the jurisdiction rests."
>
> Rea *vs.* Mirror Co., 158 N. C., 28.

It would be a useless repetition of citation to call the attention of this court to other cases in which this doctrine is reiterated and approved.

Also in the opinion in this case, when before the Supreme Court of North Carolina, this same doctrine is recognized in the following language:

> "True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end. And in such case it is not for the State court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond."
> 162 N. C., 485.

The court goes on to say, however, in qualification of this doctrine, as follows:

> "But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud, or bad faith, but, as heretofore stated, there must be full and direct statement of fact, sufficient, if true, to establish or demonstrate the fraudulent purpose."

An examination of the allegations in the petition heretofore reproduced in full in this brief, and also in the printed record at page 13, will disclose that the averments therein were not of the general nature alluded to by the lower court, but were full and direct statements of facts sufficient to establish the fraudulent purpose which the Supreme Court of North Carolina recognizes as sufficient to remove the case and to put at an end its own jurisdiction.

After making the preliminary allegations as to residence

and value of the matter in controversy, the petition sets forth fully the facts to establish the following:

First. That the resident defendant, the North Carolina Railroad Company, was a non-operating company.

Second. That the accident took place entirely off the line of the North Carolina Railroad Company, having no employees or rolling stock.

Third. That the plaintiff was an employee of the Southern Railway Company and was injured by one of its engines.

Fourth. That this engine was in the shop for repairs, and had been for 27 days.

Fifth. That plaintiff was injured while under orders to take this engine out on a trial trip, running wholly within the State of North Carolina.

Sixth. That the purpose of this run was that the plaintiff could inspect and report upon the condition of the engine.

Seventh. That it had no cars or commerce of any kind attached to it.

A perusal of the petition is convincing, it is submitted, that the averments of facts charging fraudulent joinder of the North Carolina Railroad Company are full and complete, and that under the doctrine repeatedly laid down by this court the case was *ipso facto* removed, and any further proceedings therein in the State court were absolute nullities and void.

As soon as the order for removal was entered a transcript of the record was immediately made, and the cause was docketed in the United States District Court for the Western District of North Carolina. No motion has been made in that court to remand this cause nor has the order of removal been revoked, and this cause is now pending upon the docket of the District Court of the United States for the Western District of North Carolina (Printed Record, pp. 32 and 33).

c. State Court Had No Authority to Examine Questions of Fact on Petition to Remove.

In a recent opinion of the Supreme Court of the United States all doubt has been removed upon the question of which court is charged with the duty of examining the facts in a petition to remove on the ground of fraudulent joinder, and we quote at length from the language of Mr. Justice Van Devanter, in delivering the opinion in the case of Chesapeake & Ohio Ry. Co. *vs.* Cockrell, *supra:*

> "That court, apparently assuming that the petition for removal contained a sufficient showing of a fraudulent joinder, held that the questions of fact arising upon the petition were open to examination and determination in the State court, and that no error was committed in refusing to surrender jurisdiction, because, upon the subsequent trial, the evidence indicated that the showing in the petition was not true as to the fireman. In so holding the Court of Appeals fell into manifest error, for it is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal Court, and that the State court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. Stone *vs.* South Carolina, 117 U. S., 430, 432; 29 L. Ed., 962, 963; 6 Sup. Ct. Rep., 79; Crehore *vs.* Ohio & M. R. Co., 131 U. S., 240, 244; 33 L. Ed., 144, 145; 9 Sup. Ct. Rep., 692; Illinois Central R. Co. *vs.* Sheegog, 215 U. S., 308, 316; 54 L. Ed., 208; 30 Sup. Ct. Rep., 101, and Chicago, R. I. & P. R. Co. *vs.* Dowell, 229 U. S., 102, 114; 57 L. Ed., 1090, 1096; 33 Sup. Ct. Rep., 684. In this case had the petition contained a sufficient showing of a fraudulent joinder, accompanied as it was by a proper bond, the State court would have been in duty bound to give effect to the petition and surrender jurisdiction, leaving any issue of fact arising upon the petition to the decision of the Federal court, as was done in Wecker *vs.* National Enameling & Stamping Co.,

> 204 U. S., 176; 51 L. Ed., 430; 27 Sup. Ct. Rep., 184; 9 Ann. Cas., 757. And had the State court refused to give effect to the petition, it and the bond being sufficient, the railway company might have obtaied a certified transcript of the record, resorting, if necessary, to a writ of certiorari for the purpoe, and, upon filing the transcript in the Federal Court, might have invoked the authority of the latter to protect its jurisdiction by enjoining the plaintiff from taking further proceedings in the State court, unless the case should be remanded. Madisonville Traction Co. *vs.* St. Bernatd Min. Co., 196 U. S., 239, 245; 49 L. Ed., 462; 25 Sup. Ct. Rep., 251; Chesapeake & Ohio R. Co. *vs.* McCabe, 213 U. S., 207, 217, 219; 53 L. Ed., 765, 769, 770; 29 Sup. Ct. Rep., 430; Chesapeake & O. R. Co. *vs.* McDonald, 214 U. S., 191, 195; 53 L. Ed., 963, 965; 29 Sup. Ct. Rep., 546; Franch *vs.* Hay (French *vs.* Stewart), *aa* Wall., 250; 22 L. Ed., 857; Dietzsch *vs.* Huidekoper (Kern *vs.* Kuidekoper), 103 U. S., 494; 26 L. Ed., 497."

It is considered unnecessary to cite any further cases than the Cockrell case, *supra,* but it might be well to call attention again to the fact that the Supreme Court of North Carolina has heretofore followed this rule.

In the case of Rea *vs.* Mirror Co., 158 N. C., 28, the court held that, where a petition for removal is filed containing full and direct statement of facts and circumstances showed a fraudulent joinder, in such case the jurisdiction of the State court is at an end.

In the opinion of the Supreme Court of North Carolina in the case now before this court this salutary rule was recognized, but Mr. Justice Hoke, in delivering the opinion, attempts to differentiate it by saying that—

> "From a perusal of the pleadings and the admissions of record not inconsistent therewith, * * * it might not be said that the charge of fraud must be necessarily inferred."

It is submitted that the petition for removal contained a full and fair statement of facts, from which it was neces-

sarily inferred, for the purposes of removal, that there was a fraudulent joinder of the North Carolina Railroad Company; that upon the filing of such petition the case was automatically removed to the Federal court, and that all proceedings had thereafter in the State court were null and void.

d. Defense in State Court No Waiver of Right to Remove.

The defendant, having excepted to the ruling of the court declining to remove the cause (Printed Record, p. 19), which action of the trial court was in accordance with the directions of the Supreme Court of North Carolina, and having noted its exception upon the record (Printed Record, p. 19), and having reserved its exception in its answer filed in the cause (Printed Record, p. 19), did not surrender jurisdiction to the State court nor waive its right to insist thereafter that the cause had been lawfully removed into the United States court.

The cases fully decide that—

> "Making a defense in a State court after the court has declined to surrender jurisdiction of the case does not defeat the defendant's right to insist that the case has been lawfully removed into the Circuit Court of the United States where the objection to the jurisdiction is saved upon the record."
>
> Powers *vs.* Chesapeake & Ohio R. R. Co., 169 U. S., 94.
>
> Removal cases, 100 U. S., 457.
>
> Insurance Co. *vs.* Dunn, 19 Wall. (U. S.), 214.

> "The right to remove is derived from a law of the United States, and whether a case is made removable is a Federal question. If after a case has been made, the State court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to a writ of error to this court if he saves the question on the record."
>
> Baltimore & Ohio R. Co. *vs.* Koontz, 104 U. S., 5.

> "It is undoubtedly true, as was said in Steamship Company *vs.* Tugman, 106 U. S., 122, that upon the filing of the petition and bond—the suit being removable under the statute—the jurisdiction of the State absolutely ceases, and that of the Circuit Court of the United States immediately attaches."
>
> Stone *vs.* State, 117 U. S., 430.

Under these authorities there can be no question but that if the defendant made out a removable case in its petition that the jurisdiction of the State court was at an end, and that the Federal court alone had control of the case. The action of the State court in denying to the defendant this right, and in denying to the Federal court its inherent jurisdiction, violated a right of the defendant under the laws of the United States, and such question under the statute is reviewable in this court upon a writ of error. Under the facts above recited there was no case in the State court, and all proceedings taken therein were abortive and as though they had never been taken.

While under the circumstances this defendant had no other choice than to await the proper motion to remand by the plaintiff in the Federal court, as indicated above, though it might have submitted to judgment by default, its making a defense in the State court does not operate to defeat its right to insist that error was committed in further proceeding with the case after it had been lawfully removed into the Federal court.

e. Was the Federal Employers' Liability Act Applicable?

The answer to this question depends upon two facts, both of which must exist. First, the defendant must have been engaged in interstate commerce, and secondly, the plaintiff must have been likewise engaged at the time of his injury. It is conceded that the defendant is an interstate carrier, but an examination of the facts will clearly disclose that neither Lloyd nor engine 579 was engaged in, nor connected with,

interstate commerce. In fact, they were not engaged in, nor connected with, commerce of any kind. The record discloses that engine 579 had been withdrawn from service and shopped for repairs on December 16, 1910 (Printed Record, page 15), while the accident happened on January 12, 1911, 27 days later. During all this time this engine had been in the repair shop at Spencer, N. C. On the morning of January 12, 1911, it was taken out of the shop and carried to a side track nearby for the purpose of being taken on a trial run to Barbers, a point eleven miles distant and wholly within the State of North Carolina (Printed Record, page 63). There were no cars of any description connected or to be connected with this engine, and the sole purpose of the trial run from Spencer, N. C., to Barbers, N. C., was to determine whether the engine was in proper condition to reenter the service (Printed Record, pages 38, 40, and 63). If the engineer in charge of this engine, the plaintiff in this case, had reported that the engine was not in proper condition, then further repairs would have been made to make it in serviceable condition (Printed Record, page 39). Upon this point the plaintiff himself testified as follows (Printed Record, page 39):

> "It was my duty, and I say in my complaint, to ascertain whether or not that engine was in serviceable condition to go out on that trip; that was the very purpose of taking the engine out at all, was to take it out to see whether it was in serviceable condition. Anything that would be wrong or unserviceable, of course, I would be expected to report, and if I had not gotten hurt with that damper and had investigated it, it would have been my duty to report it to the foreman to be properly adjusted, which I would have done if I had not been hurt."

In other words, the inspection and repair of engine 579 by the plaintiff was a condition precedent to its being reassigned to active work, from which it had been withdrawn 27 days previously. If engine 579 was not an instrumentality

engaged in interstate commerce, then certainly Lloyd, who was detailed to take this engine out on this trial trip, was likewise not engaged in interstate commerce.

The Superior Court of Guilford County decided that the act was not applicable. This, however, was reversed by the Supreme Court of North Carolina, the court citing as its authority to sustain the position that Lloyd was engaged in interstate commerce the case of North Carolina Railroad Company *vs.* Zackary, 232 U. S., 248, and distinguishing and holding inapplicable the case of Illinois Central Railroad Company *vs.* Behrens, 234 U. S., 473. An examination of the facts of these two cases will clearly establish that the facts in the Zackary case are entirely different from the ones in this case, and that if either of these cases is controlling the principles applied in the Behrens case, *supra*, determine the question in this case adversely to the plaintiff.

In the Zackary case the plaintiff's intestate was on duty, having been called to take out an interstate train, which had just come in from Pinners Point, Va., to Selma, N. C., from which point it was to proceed to Spencer. The plaintiff's intestate, a fireman, had been called for duty, had oiled and fired his engine, which was standing ready to proceed on its journey in a short time, when he was stricken and killed by a switch engine shifting cars to be placed in this very train. There was no question but that the train was an interstate train, and there was no question but that both engines involved were engaged in active duty in connection with this very train. In the instant case, engine 579 had been withdrawn from service of any character, and had not been reinstated in the work. It was, so to speak, a dead engine.

In the Behrens case the engine and crew involved were handling purely intrastate commerce at the time of the accident, but the next move that they were to make was to handle interstate commerce. In the instant case, the *next move* that engine 579 was to make, after it had been reported in serviceable condition by the plaintiff, was to be re-

assigned to the active duties from which it had been withdrawn 27 days previously.

The true test is well stated by Mr. Justice Van Devanter in delivering the opinion of the court in the Behrens case, *supra:*

> "Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of the task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

In Ruck *vs.* Chicago, &c., Ry. Co. (Wis.), 140 N. W., 1074, plaintiff was engaged at the time of his injury in repairing a boiler, which had been attached to and used in operating a derrick of a wrecking train used in both kinds of commerce, but which was at the time in the round-house for repairs.

In discussing the question of whether or not the plaintiff was engaged in interstate commerce, the court, reaching the conclusion that he was not so engaged, said:

> "We reach the conclusion that the employee is not employed by the carrier in interstate commerce where he is engaged in constructing or repairing an appliance, which appliance may hereafter be used to facilitate intrastate or interstate transportation as occasion may require and is intended for such use, but is not at the time the repairs in question are being made in use for the purpose of facilitating interstate transportation. This disposes of all liability of the defendant under the act of Congress in question, and other contentions of the defendant made respecting this subject need not be considered."

This case was followed in Gray *vs.* Chicago, &c., Ry. Co. (Wis.), 142 N. W., 505.

In La Casse *vs.* N. C., &c., Ry. Co. (La.), 64 So., 1012, plaintiff's duties consisted in receiving the locomotives that came to the roundhouse, taking care of them, and having them filled with water and steamed up, ready for use whenever called for. While engaged in such work he was injured, and it was claimed he was entitled to sue under the Federal act. The Supreme Court of Louisiana, in deciding that he was not engaged, in interstate commerce, uses the following language:

> "If the fact that the locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, were equivalent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, every one of its employees would at all times be engaged in interstate commerce when at their work. The two decisions of the Supreme Court of the United States, *supra,* are relied upon by defendant's learned counsel; but these decisions, as we understand them, are very far from having that broad scope. In one of them a clerk was injured while actually on his way to take the numbers of, and seal up and label cars loaded with interstate freight. In the other an employee was killed while carrying a sack of bolts to be used in repairing a bridge which was regularly in use in interstate commerce. In those cases, although the connection was but slight, there was a direct engagement in interstate commerce, whereas a locomotive or an empty car, which has completed an intrastate run and may on its next run be used in like manner intrastate, cannot be said to be actually engaged in interstate commerce. The most that can be said is that it has been so used, if such be the fact, and that it may on its next run be so used."

See also the case of Wright *et al. vs.* Chicago, &c., Ry. Co. (Neb.), 143 N. W., 220, where the contention was raised that

an engineer was entitled to sue under the Federal act. In deciding that he was not, the Supreme Court of Nebraska said:

> "It is probably true that, if Mr. Wright was engaged in interstate commerce at the time he was killed, the remedy would be under the Federal act exclusively; but the trouble with this contention is neither Mr. Wright nor the engine 1486 was at the time engaged in interstate commerce. His order was to take this engine from Fairbury, in Nebraska, to Albright, in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective, and was on its way to the car shops for repair."

The Appellate Division of the Supreme Court of New York is in line with the above authorities, as will be seen from the case of Parsons *vs.* Delaware & Hudson Company, 153 N. Y. Supp., 179. This is a case where a car repairer was injured while at work upon an empty car that had been brought into the shops for repairs. This was a canadian car which had left a point in Pennsylvania for a point in Maine, and then came empty to a point in New York, when it was taken to the railway company's car shops. After it had been repaired it was taken to another point in New York and loaded for an interstate trip. Plaintiff claimed that he was entitled to sue under the Federal Employers' Liability Act, for the reason that he was engaged in interstate commerce when injured while repairing this car. The court, after discussing the various cases on both sides of this subject, said:

> "These cases show that we are not to be governed by technicalities; that the Federal and State statutes are each to have a reasonable construction and may be harmonized. The actual work being performed at the time of the injury determines its character and is the real test whether it is interstate or intrastate work. The State law must give way to the Federal statutes, but they are not necessarily antagonistic. It

is a well-known custom that a railroad company at its pleasure uses foreign cars found upon its road, making compensation therefor, and that it is not required promptly to return home a car if it has use for it. For all practical purposes we may treat this car as that of the appellant company. It was in its possession, subject to its control and use at its will in its business, with no recognized obligation to send it home while it had use for it. We may assume that, if the empty car was to go home at once, it would not have been placed in the repair shop for the extensive repairs contemplated. It is true that, after the car left the shop, it was taken to Corinth and there loaded with paper for Cleveland. If the appellant had desired, it might as well have been loaded with freight for Albany, Buffalo, or any other intrastate point. There is nothing to indicate that, at the time the car was taken to the shop, there was an intention that its next trip should be an interstate one. Evidently there was no intention upon the subject. It was not known just when the repairs would be finished or what use the appellant would make of the car when it left the shop. The movement of the empty car from Eagle Bridge to Colonie and from Colonie to Corinth was not interstate commerce. The interstate trip from Pennsylvania to Maine and from Maine to Eagle Bridge had been finished. The interstate trip from Corinth to Cleveland had not been entered upon. We may assume that cars are loaded at Corinth Mills daily for different destinations. The load for this car happened to be interstate freight. Apparently the loading was the first indication of an interstate trip. We need not consider what would be the result if this car, en route from Maine to Canada, had been stopped off at Colonie for repairs necessary to be made to enable it to get home.

"This case is unlike Pedersen *vs.* Delaware, Lackawanna & Western Railroad Co., 229 U. S., 146; 33 Sup. Ct., 648; 57 L. Ed., 1125; Ann Cas. 1914C, 153. There the work was being performed upon a bridge which was used for interstate and intrastate commerce. Here the work was being performed in the appellant company's shop, where the employee is called upon

> to perform any work required. The mere fact that he was engaged upon an empty foreign car partly dismantled (used indiscriminately for intrastate and interstate commerce as occasion required) does not deprive him of the benefit of the laws his State has made for his protection. The shops and the tracks leading into them were not used at any time as an agency in interstate commerce as such. We need not inquire what rule would apply if the car had contained interstate freight in transit. If a home car of the appellant company, at the end of an interstate trip, in need of repair before again entering service, had been brought into the shops for repair, the repair would not be an act of interstate commerce merely because the first trip after the repairs happened to be an interstate service. The after service is immaterial. The question is as to the character of the car as it stood in the shop."

Thus the act has been held inapplicable where there was no proof that the engine and cars were used in interstate commerce (Rose *vs.* Erie R. Co., 135 Fed., 311) and where an engine was hauling a defective empty car alone for the purpose of repair (Chicago & N. W. Ry. Co. *vs.* United States, 168 Fed., 236; Siegel *vs.* New York Central, &c., Ry., 178 Fed., 873; United States *vs.* Rio Grande Western Ry. Co., 174 Fed., 399).

See also

Delk *vs.* St. Louis, &c., Ry. Co., 220 U. S., 580.

f. No Negligence Proven Against Defendant.

Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Assignments of Error.

The above assignments of error will be discussed together, and not separately, as they in effect raise the same question—that is, whether any negligence was proven in the case that would entitle the plaintiff to recover. These assignments are

reprinted in full, both in this brief, *ante*, pages 16 to 20, and in the printed record, pages 82 to 84. The second and third assignments relate to the refusal of the court to dismiss the case upon motion for nonsuit, while the fifth, sixth, seventh, and tenth assignments relate to the refusal of the court to grant certain charges on behalf of the defendant and the granting of a certain charge on behalf of the plaintiff. The ninth assignment relates to the charge to the jury that if they find the facts to be true as testified to by the witnesses they should answer the second issue yes. The eleventh relates to the signing of the judgment.

Nonsuit Should Have Been Granted.

At the close of the testimony the defendant moved for a nonsuit, according to the State practice (Printed Record, pp. 45 and 68). The trial court overruled this motion and submitted the case to the jury (Printed Record, pp. 45 and 68), who returned a verdict for the plaintiff in the sum of twelve thousand five hundred dollars ($12,500.00) against the defendant, but found no verdict against the North Carolina Railroad (Printed Record, p. 82). Proper exception was noted to the action of the trial court (Printed Record, p. 82), and, upon error to the Supreme Court of North Carolina, his judgment was affirmed (Printed Record, pp. 85 *et seq.*). The matter is now here for decision whether there was sufficient evidence of negligence upon the part of the defendant to justify the action of the State court in holding that the motion for nonsuit should not have been granted.

If it be decided that Lloyd was engaged in interstate commerce and that the State court properly retained jurisdiction of the cause, the defendant contends that there was not sufficient evidence of negligence to support a verdict under the Federal Employers' Liability Act.

It is clear that this court has power under the Judiciary Code, section 237, to look into this question, and if there was not sufficient evidence of negligence to constitute liability,

the action of the State court denied to this defendant a Federal right or immunity arising under that act, and to which it was entitled, and which will support a writ of error to this court.

The case of S. A. L. Ry. *vs.* Padgett, adm'x, No. 710, October term, 1914, decided March 22, 1915, was a suit for damages by reason of the death of plaintiff's intestate, an engineer. The negligence alleged was an uncovered pit in the roundhouse of the defendant and also insufficient lights. In delivering the opinion of the court Mr. Chief Justice White said:

> "If our jurisdiction attaches, it can only be because the right to recover was based upon the act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But as pointed out in St. Louis & Iron Mountain Ry. Co. *vs.* McWhorter, 229 U. S., 265, 275, although the cause of action relied upon was based upon the Federal statute, nevertheless, 'as it comes here from a State court, our power to review is controlled by Rev. Stat., sec. 709 (sec. 237, Judicial Code), and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, that is to say, the right of the defendant to be shielded from responsibility under that statute because when properly applied no liability on his part from the statute would result. Seaboard Air Line Ry. *vs.* Duvall, 225 U. S., 477; St. Louis, I. M. & S. R. Co. *vs.* Taylor, 210 U. S., 281.'"

After disposing of the assignments of error relating to assumption of risk the Chief Justice further says:

> "While this disposes of the two assignments which are directly and specifically concerned with the interpretation of the statute, nevertheless the remain-

ing seven also raise questions of law under the statute, since they all in one form or another rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration. Cresswill *vs.* Knights of Pythias, 225 U. S., 246, 261; Southern Pacific Co. *vs.* Schyler, 227 U. S., 601, 611; St. Louis & Iron Mountain Ry. Co. *vs.* McWhiter, *supra,* pp. 276, 277; Miedrich *vs.* Mauenstein, 232 U. S., 236, 243, 244; Carlson *vs.* Curtiss, 234 U. S., 103, 106."

The reason for this salutary practice is well stated by Mr. Justice Moody in St. Louis, &c., Ry. Co. *vs.* Taylor, *supra:*

"Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicity conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

g. Assumption of Ordinary Risks.

Mr. Labatt, in his work on Master and Servant, lays down the general rule that ordinary risks are presumed to have been undertaken by a servant:

"1167. (259) ORDINARY RISKS PRESUMED TO HAVE BEEN UNDERTAKEN BY A SERVANT.—In 1837 it was laid down in the leading case of Priestley *vs.* Fowler that a servant assumes all the ordinary risks which are incidental to his employment; and this doctrine has ever since been applied by the courts of all the countries in which the common law is the prevailing system of jurisprudence. The inability to maintain an action is a peremptory conclusion of law, if it is apparent that the injury resulted from a risk of this description, unless the plaintiff can adduce evidence which fairly tends to show that the injured person, by reason of his want of experience or his tender years, was not chargeable with that comprehension of the risk which, in the absence of such evidence, he is presumed to have possessed. See par. 1168, *post.*

"The resulting situation, when considered from the standpoint of the master' duty, is that he is under no obligation to provide against the ordinary risks incident to the performance of the contract of service, the rule under this form also being qualified in the case of experienced persons and minors. Accordingly, if the risk to which the injury was due was an ordinary one, the employer is not liable even if the employee did use ordinary care. The obligation of the servant to use proper care is obviously quite immaterial when the applicability of the doctrine as to assumption of risks is in question.'

Again he says in section 1171:

"1171. (263) RISKS ARISING FROM THE CHARACTER OF THE INSTRUMENTALITIES USED.—The recognition of the right of an employer to carry on his business in his own way, and to adopt any matters or description of instrumentalities which he may prefer, involves the consequence that any risk which is due merely to the character of an instrumentality, and not to its abnormal condition or intrinsically defective quality, is to be deemed an ordinary risk of the employment."

In section 1173, note 1 (G), he points out a large number of cases where a servant assumes the risk incident to operation of the machinery.

h. Assumption of Risk Incident to Service is Not Really Assumption of Risk, but Merely States the Rule That There Was No Negligence, and Consequently is Not Necessary to be Plead as a Defense.

In Labatt on Master and Servant, section 1186A, the true scope of the doctrine of assumption of risk is well discussed as follows:

> "1186A. TRUE SCOPE OF THE DOCTRINE OF ASSUMPTION OF RISK.—In sec. 1164 it is stated that for the purposes of the commentator it is more convenient to divide the risks to which the servant may be subjected while in his employment into two classes—the ordinary risks and the extraordinary risks. There is also a strong logical reason for this, namely: If the servant is injured by an ordinary risk of the service, the master is not *prima facie* liable, and need not resort to any of the subsidiary elements of the law of master and servant, such as assumption of risk, contributory negligence, or the fellow-servant rule, to prevent a recovery; while if the servant is injured by an extraordinary risk, the master is *prima facie* liable, and, to prevent a recovery, must resort to one of the defenses noted. Thus, it will be seen that when the phrase 'assumption of risk' is used with reference to the ordinary risks of the service, it does not express an independent rule of law, but is merely a mode of expression extensively used to express that very vital principle of the law of master and servant that the master is not liable where he has not been at fault.
>
> "In respect to assumption of risk as embracing the risks due to the master's negligence, it is very frequently stated that the servant never assumes the risk of the master's negligence. In some cases this statement is supplemented by the qualification that the servant does not assume the risk of the master's

negligence except where, with knowledge of such negligence, he voluntarily remains in the employment. It should be borne in mind that, with the exception of Missouri and North Carolina, the exception is as broad as the rule, and that whenever such a statement is made and the rule apparently applied by the court it is in a case where the servant was not aware of the negligence, or at least did not appreciate the danger.

"The rule as to assumption of risk may be briefly expressed as follows: The servant assumes all the ordinary risks of the service and all of the extraordinary risks, *i. e.*, those due to the master's negligence—of which he knows and the dangers of which he appreciates. Stated in this form the rule is followed, in the absence of statute, in all jurisdiction except Missouri and North Carolina. But even in this form it must be borne in mind that as a vital principle of the law of master and servant the doctrine of assumption of risk operates only in case the master has been negligent. In such a case it operates to release him from the consequences of his negligence. If the master has not been negligent, the phrase 'assumption of risk,' as was stated above, is used merely to connote the general rule that the master is not liable for injuries which are not due to fault on his part. These principles are emphasized in a number of recent cases.

"It should be noted also that statutes which in terms abolish the doctrine of assumption of risk as a defense go no further than to abolish the defense where the servant is injured by reason of the master's negligence, and do not abolish assumption of risk where the master has not been negligent."

So, also, in New York, &c., R. Co. *vs.* Vizari, 210 Fed., 118, the court recognizes this, in the following language, at page 120:

"The defendant did not plead assumption of risk, but it relied upon it at the trial, and the court left it to the jury to say whether the plaintiff assumed the risk of the use of the chisel. In considering the necessity and sufficiency of the pleas of assumed risk,

it is necessary to observe that a difference exists between the assumption of the 'ordinary' risks of the employment and the assumption of the 'extraordinary' risks. If the risk is of the former kind, it is not incumbent on the defendant to plead it; but, if the risk is of the latter kind, the rule in some jurisdictions is that, if the defendant desires to rely upon it as a defense, he must specially plead it. See Labatt on Master & Servant, vol. 4, sec. 1636; Bailey on Personal Injuries (2nd ed.), vol. 3, sec. 851."

i. The Rule of Ordinary Care Obtains in the Federal Courts, and the Plaintiff Assumes the Risk Incident to the Service.

The leading case upon this question is that of Patton *vs.* Texas & Pacific R. Co., 179 U. S., 658, where the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer may have been guilty of negligence. Texas & P. R. Co. *vs.* Barrett, 166 U. S., 617; 41 L. Ed., 1136; 17 Sup. Ct. Rep., 707. Second, That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide

a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. Hough *vs.* Texas Pac. R. Co., 100 U. S., 213; 25 L. Ed., 612, 615; Baltimore & Ohio R. Co. *vs.* Baugh, 149 U. S., 368, 386; 37 L. Ed., 772, 780; 13 Sup. Ct. Rep. 914; Baltimore & P. R. Co. *vs.* Mackey, 157 U. S., 72, 87; 39 L. Ed., 624, 630; 15 Sup. Ct. Rep., 491; Texas & P. R. Co. *vs.* Archibald, 170 U. S., 665, 669; 42 L. Ed., 1188, 1190; 18 Sup. Ct. Rep., 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery.

"The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar for this court, in Washington & G. R. Co. *vs.* McDade, 135 U. S., 554, 570; 34 L. Ed., 235, 241; 10 Sup. Ct. Rep., 1044:

" 'Neither individuals nor corporations are bound as employers to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him and was unknown to the employee or servants.' "

So, also, in Butler *vs.* Frazer, 211 U. S., 459:

"One who understands and appreciates the permanent conditions of machinery, premises, and the like, and the danger which arises therefrom, or, by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover, against his employer for the resulting injuries. Upon the state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it or any attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves ot the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it, which from time to time have been made, as for instance, by Congress in the Safety Appliance law."

"Where the elements and combinations out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held as a matter of law to understand, appreciate and assume the risk of it. Texas & P. R. Co. *vs.* Swearingen, 196 U. S., 51; 49 L. Ed., 382; 25 Sup. Ct. Rep., 164; Fitzgerald *vs.* The Conn. River Paper Co., 155 Mass., 155; 31 Am. St. Rep., 537; 29 N. E., 464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both

> the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton *vs.* Texas & P. R. Co., 179, U. S., 658; 45 L. Ed., 361; 21 Sup. Ct. Rep., 275, and cases there cited. The cases at bar falls within this class."

See generally upon this question the following cases:
Northern Pac. R. Co. *vs.* Peterson, 162 U. S., 346.
Hough *vs.* Texas & Pac. R. Co., 100 U. S., 213.
Southern Pac. R. Co. *vs.* Seley, 152 U. S., 145.

This doctrine is well settled in North Carolina, as will be seen by reference to the case of White *vs.* Power Company, 151 N. C., 358, where the court says:

> "A servant who is engaged in the work of bringing back to a safe condition any part of the plant which has become abnormally dangerous, assumes all the risks which are obviously incident to the work thus undertaken. As regards such a servant those risks are ordinary even though their existence may as regards servants whose duties involve merely the use of the instrumentality in question, imply culpability on the master's part. In other words, a servant put to work to repair a defective appliance cannot be heard to complain of its being defective inasmuch as that very thing is the cause of his being there, and he undertook to set it right, being paid for the risk he ran and voluntarily incurring it. The rule which casts upon the master a liability for failing to provide reasonable and safe instrumentalities for the use of his servants is deemed to be suspended under such circumstances."

This case cites the case of Spinning Company *vs.* Achord, 84 Ga., 14, in which the following language was used:

> "While it is the duty of a master to furnish his servants safe machinery for use, he is under no duty to furnish his machinists safe machinery to be repaired or to keep it safe while its repairs are in progress. Precisely because it is unsafe for use repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured as the machinist to have sound and safe machinery to be repaired."
>
> See also the case of Lane *vs.* Railroad, 154 N. C., 96.

Application of Evidence to Above Principles.

The plaintiff himself testified as to the operation of the lever as follows (Printed Record, p. 35):

> "This lever is operated—I mean this mechanism is operated by this lever and the connections has a center point, and in closing it, it brings this lug on the shaft, and then the front end of the rod is connected through the damper by nuts. At this position there is a strain on this rod and it takes force to put it by that point, and when once past the center the inclination of the force is to hold that lever closed and the damper shut. If you go to pull it open, it takes force to pull it by that position, and when by that position, all the force of this lever and shaft and damper helps force the lever back and the damper open. The tightening of the nut on that rod that extends from the shaft to the damper gave this lever force—made it in the nature of a spring. You could put so much force that a man's strength would not operate it if you continued to tighten that nut, just running it up by moving the jamb nut of the damper and shortening the travel of the rod. You can run the nut the other way and take all the force away from it. When the nut and this lever rod is properly adjusted, it is sufficiently easy for a man to operate it safely; that has no danger when properly adjusted,

as it remains closed when closed and open when open. Putting it on a center point it is not closed, neither is it open—the damper is shut but not locked, it is very easy to move either way, and should there be a jar or an explosion of the ashpan or anything which would alter the tension on this rod, it would go whatever direction it most inclined."

Again he said (Printed Record, p. 38):

"I can't say that there was no danger in handling these that way to the person operating it; there is danger to them any way you handle it; there is danger to the person operating it no matter how you handle it, if you take one improperly adjusted; they are universally known to be dangerous if they are not properly adjusted; anybody can tell you that, fireman or anybody. If properly adjusted you can handle them any way you want to and not hurt you. I told his honor and the jury only a short time ago that the proper way was to stand with your face toward the front of the engine and stoop down and pull and bring your body up with the lever; that would be the natural way."

J. M. Frick, witness for the defendant, a boilermaker, testified as follows (Printed Record, pp. 48-49):

"It is adjusted now about like I adjusted it that day; probably a little tighter; it was a little tighter then; adjusted just as it is now, it will stand half adjusted, but will not go either way unless something hits it; that one is adjusted that way now; it is the first one I ever seen stand on the center; that is fixed so now that with a little touch it will fly up, and press it, it will go down; the other one I fixed is just like this one."

* * * * * * *

"It was adjusted just exactly like all of them are; I adjusted them pretty near the same; just locked tight enough to hold it down so that nothing would jar it up. Nothing there to knock unless you caught hold; we adjust them tight enough so that if they are

running over the road the jar would not knock them loose and lose the fire, and that is the way this one was fixed that morning. It was adjusted just exactly like all; that is the way this one was fixed that morning; I didn't leave it on the center; I could not leave it on the center."

H. S. Williams, a fireman, witness for the defendant, testified as follows (Printed Record, p. 50):

"I came around and down on the ground and Mr. Lloyd had come on around and he came on up and oiled his side rods on the engine, main connections, and he just left and walked right on up towards where I was and stooped down and reached and got hold of the ashpan lever and pulled up on it. He was standing straight, at right angles with the engine, with his face toward the engine; caught hold with one hand first and pulled, and he failed to open it, and then he caught hold with both hands, to the best of my knowledge. I was standing behind him; I did not see the lever hit him; he raised it like that (illustrating), and fell right back."

* * * * * * *

"Mr. Lloyd came around to the engine and reached down and took hold with one hand, as I have described; tried to pull it up and it would not come, and then he took hold with both hands; when he caught hold of it with both hands and pulled, it flew up and I saw him fall back; it knocked him plumb his length, plumb back further than his feet were; he was unconscious, I thought he was dead at the time; there was blood left on the corner of the lever."

Charlie Hairston, grateman, witness for the defendant, testified as follows (Printed Record, pp. 53-54):

"Mr. Lloyd came down on the left hand side and walked up to the engine a piece and looked over it with his oil can in his hand; he walked back to the ashpan lever and caught hold of it and pulled at it, but he did not pull it up; he walks up about half way

> of the engine and puts on the oil and walks back down to this lever and catches hold of it and gives two pulls at it and it comes open. He was standing with his face right towards it; when he pulled it he was standing at right angles to the engine and at right angles with respect to the lever; when it comes up he fell over."

E. Fuller, shop superintendent, witness for defendant, testified as follows (Printed Record, p. 59):

> "A man could handle it with either hand; it was a little tighter than the one here; it was not down there so tight that he needed to take two hands; it was not down so tight that when you pulled it up with that hand you could not hold it and keep it from hitting you."

C. H. Chandler, engineer, witness for defendant, testified as follows (Printed Record, pp. 64-65):

> "My duty was to find out whether at the roundhouse they had got it too tight or too loose, or properly adjusted, and if I find that they are not properly adjusted to report to the roundhouse, bring it back and report it to the roundhouse, and they fix it. As to whether I shall fix it, it depends upon the extent; if it is a good, big job we get the machinist to do it; if it is just a little job that won't take more than a minute or two, we do it ourselves; if it was adjusting a nut on the ashpan lever, we would do that ourselves. It would be our duty, in one way; it was a small job, that is what we worked for; if we could fix a small job before we could get a machinist, we do it ourselves; sometimes the fireman has to adjust the ashpan, tighten them up; they get too tight or too loose."

It is respectfully submitted that there is no evidence in the record of any defect or negligence in the construction or condition of the ashpan damper lever that struck the plaintiff. The plaintiff himself, and his only witness, Perry, testified that he did not touch the lever with his hands; that

it just flew up, though it is possible that he might have struck it with his knee.

A number of witnesses for the defendant, who examined the engine immediately before and immediately after the accident, testified that the lever was in perfect condition; that the amount of spring in it was determined by the tightness of the nut, and that this condition was well known to all experienced employees.

On the other hand, a number of witnesses for the defendant, who saw the accident, testified that Lloyd caught hold of the lever and jerked it up himself, standing facing the engine, a dangerous position, well known to him and to all experienced employees. The record is full of evidence to the effect that the proper way to pull up the lever was to stand with his side to the engine, so that when he pulled the lever up his head and body went up with it. If he had followed this well-known method of operation, he could not have been injured; therefore it is submitted that, if there was any negligence in the case that was responsible for his injury, it was that of the plaintiff himself.

The plaintiff not only knew of the danger and that the lever might be adjusted easily if too tight, but also had the means of adjustment with him at the time, and furnished to him by the defendant, to wit, a monkey-wrench.

See testimony of John Perry, witness for plaintiff (Printed Record, p. 44):

> "He had his oil-can and monkey-wrench in his hand."

Plaintiff testified that he knew of the dangers incident to the work; that he noticed there was something wrong with the lever; that he went forward to inspect it, and that it was his duty to inspect and repair small defects, and his own witness testified that he had the instrument in his hand with which such repairs are ordinarily made. Did he not, then, necessarily assume the ordinary risk attendant upon such work?

j. Issue of Contributory Negligence Should Have Been Submitted.

The defendant's fourth assignment of error is the following:

> "For that the court submitted the issues as shown in the record and declined to submit the issues tendered by the defendant, the Southern Railway Company, as set out in the case on appeal."

According to the practice in North Carolina, separate issues are submitted to the jury, and, according to that practice, the defendant asked that the issue be submitted:

> "Did the plaintiff contribute by his negligence to his own injury, as alleged in the answer?
>
> "How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him?
>
> "What sum should be deducted from the damages sustained by the plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?"

The court refused to submit these issues tendered by the defendant, and exception was noted upon the record (Printed Record, p. 69).

We submit that in a trial under the Federal Employers' Liability Act that, although contributory negligence according to the terms of said act will not defeat a recovery, still that the issue as to contributory negligence should be submitted to the jury, and should be answered by them in order that the court and the parties to the action may be able to know upon the rendition of the verdict whether the jury had considered the question of contributory negligence, and whether it had properly made the reduction to which the defendant was entitled under the law when they passed upon the issue as to damages. In no other way could this be

ascertained, and it was error in the court to decline to submit the issues of contributory negligence and the amount to be deducted from damages sustained by the plaintiff on account of said negligence.

> "Substantive right of defense arising under the Federal law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."
>
> Norfolk Southern R. R. Co. *vs.* Walter C. Ferebee, 35 Sup. Ct. Rep., 782.

k. If the Plaintiff Was Not Engaged in Interstate Commerce the Suit Should Have Been Dismissed.

The present action was brought under the Federal Employers' Liability Act, and unless the plaintiff's case established that he was engaged in interstate commerce at the time of his injury, his action must fail. We have discussed fully, *supra*, the question of whether Lloyd was engaged in interstate commerce at the time of his injury, and the conclusion reached that he was not so engaged.

It is well settled by numerous decisions of this court, since Congress, by the act of 1908, took possession of the field of the employers' liability to employees in interstate transportation all State laws upon the subject are superseded.

2d Employers' Liability cases, 223 U. S., 1.

Seaboard Air Line R. Co. *vs.* Horton, 233 U. S., 492.

In a recent case decided by this court on June 21, 1915, Delaware, &c., R. Co. *vs.* Yurkonis, 35 Sup. Ct. Rep., 902, this court through Mr. Justice Day, after reaching the con-

clusion that Yurkonis was not engaged in interstate commerce, said:

> "The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act."

We submit then that the facts in this case demonstrate, beyond question, that Lloyd was not engaged in interstate commerce, and, therefore, having elected to try his case under the Federal act, his action necessarily falls when he failed to produce evidence to establish the essential fact that he was engaged in interstate commerce when injured.

1. Summary.

In conclusion we respectfully submit that an examination of the record will show that the following facts exist:

First. That the North Carolina Railroad Company was fraudulently joined as a codefendant in the case;

Second. That the petition for removal succinctly and clearly stated facts from which it was necessarily inferred that the joinder of the North Carolina Railroad Company was fraudulent;

Third. That this being true, the defendant was entitled to a Federal court to pass upon the facts alleged as showing a fraudulent joinder;

Fourth. That the evidence clearly shows that Lloyd was not engaged in interstate commerce at the time of his injury;

Fifth. That under the facts in the case no negligence was proven against the defendant, and the injury was due either to the assumption of an ordinary risk, or to the negligence of the plaintiff.

We respectfully urge that upon a full and fair consideration of the whole case that the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

L. E. JEFFRIES,
JOHN M. WILSON,
H. O'B. COOPER,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 296.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. L. LLOYD.

ADDITIONAL AUTHORITIES OF DEFENDANT IN ERROR.

In response to an inquiry from the court on yesterday, if we had found a case upon removal which precluded the plaintiff below from prosecuting his trial in the State court after the trial judge had nonsuited the local defendant, we beg to advise that we think the case of American Car Company *vs.* Kittelhake, 236 U. S., 315, is conclusive of this question. Record, page 17, shows that the original petition for removal was filed in December, 1911; that it was then denied, and that the railroad company did not file a transcript in the United States court, but answered. (See second petition, page 26 of the record.)

In 1913 the case came on for trial upon its merits, the State court having jurisdiction of the parties and the subject-matter and no record of the former petition for removal having been made up to that time in the United States Court. After the plaintiff had concluded his case, the trial judge, upon motion, nonsuited one of the defendants, the North Carolina Railroad Company, and also held that the plaintiff was not engaged in interstate commerce, as contemplated by the act of Congress. These rulings are set forth in the court's judgment (Record, page 28). From these vital rulings the plaintiff appealed to the Supreme Court of North Carolina.

The fact that the presiding judge also ordered the case removed to the Federal Court to try the remaining question did not make a finality, and in fact an appeal to the Supreme Court of the State, under the North Carolina practice, stayed all further proceedings until his judgment was either affirmed or reversed.

The Supreme Court of North Carolina (162 Report, page 485), reviewing this judgment, reversed the ruling of the lower court, and directed that the trial be proceeded with. This court has held that such rulings were on the merits and *in invitum*.

Kansas City Suburban R. R. Co. *vs.* Herman, 187 U. S., 69.

Whitcomb *vs.* Smithson, 175 U. S., 635.

American Car Company *vs.* Kettelhake, *supra*.

Congress has enacted that this class of cases shall not be removed to the United States court for trial. The Judicial Code likewise so directs, and this court in a recent opinion has so declared.

Certainly no inferior State court judge has the right or power during the progress of the trial, after the plaintiff has concluded his case, to so eliminate the parties from the action as to constitute a case which he thinks then removable and

openly overrule the act of Congress, Judicial Code, and the decisions of this court.

The last decision of the Supreme Court of North Carolina in this case is reported in 166 N. C., page 24.

Respectfully submitted,

AUBREY L. BROOKS,
Attorney for Defendant in Error.

(29778)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBR TERM, 1915.

No. 296.

SOUTHERN RAILWAY COMP'Y, PLAINTIFF IN ERROR,

vs.

W. L. LLOYD, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS..

This action was brought in the Superior Court of Guilford County, North Carolina, under the Federal Employers' Liability Act by W. L. Lloyd against the plaintiffs in error, Southern Railway Company, a Virginia corporation, and the North Carolina Railroad Company, a North Carolina corporation. Both of the railroads were engaged at the time of the injury of defendant in error in interstate commerce as public carriers, and he was employed by the plaintiff in error Southern Railway Company in the conduct of its interstate business, to-wit, as engineer on its trains running from Spencer, North Carolina, through Greensboro, North Carolina, to Monroe, Virginia. The Southern Railway Company is lessee for ninety-nine years of the North Carolina Railroad Company and uses the latter's tracks from Greensboro, North Carolina, to Salisbury, North Carolina, as its main line from North to South. The defendant

in error was injured at Spencer, North Carolina, on a side-track of the North Carolina Railroad's main line between Greensboro and Salisbury. This side-track was connected at each end with the main line. The plaintiffs in error duly filed a petition to remove said cause for trial to the United States Court for the Western District of North Carolina. This petition set forth that the State Court had no jurisdiction to try the cause, for that the North Carolina Railroad Company was fraudulently joined as a party defendant in the State Court, and that the action was brought under the Federal Employers' Liability Act, and should be heard and determined by the United States Court. The Superior Court ordered the case removed to the Federal Court, and from this order the plaintiff appealed. The Supreme Court of North Carolina reversed the ruling of the lower court and directed that the trial be proceeded with in the State Court.—162 N. C., 485.

At the trial upon the merits the defendant in error recovered judgment for $12,500.00, which upon appeal to the Supreme Court of the State was affirmed. The plaintiff in error urged before the Supreme Court of North Carolina its exceptions to the jurisdiction of the State Court to try and determine the issues involved. The Supreme Court of North Carolina held with the defendant in error upon all the questions presented, and from this judgment a writ of error was sued out by the plaintiff in error to this Court, seeking to review the judgment and decree of the Supreme Court of North Carolina.

The defendant in error, as disclosed by the record, was seriously and permanently injured. (Record, page 68.) The agreed state of facts constituting the record upon appeal to the Supreme Court of North Carolina contains this statement:

"There was evidence tending to show that the plaintiff was permanently injured by the breaking of his skull, and that as a result he has neurasthenia, impaired eyesight, disordered mentally, and his nervous system broken down."

ARGUMENT.

The Supreme Court of North Carolina in reviewing the action of the trial court, upon the Railroad Company's exceptions, stated that five questions were presented for consideration in the record:

1st, was the State Court without jurisdiction to try and determine the controversy?

2nd, the refusal of the Court to submit certain issues tendered by the defendants and the adoption of others in their stead.

3rd, the denial of motion to non-suit under the Hinsdale Act, Revisal 1905, Section 539.

4th, refusal to instruct the jury as requested.

5th, error in the instructions given, as specified in the exceptions thereto.

The questions presented under the second and third heads above noted, regarding the submission of issues to the jury and a non-suit under the Hinsdale Act, involved purely questions of State practice, and we assume that the decision of the Supreme Court of the State will be treated as conclusive upon those questions. The Supreme Court of North Carolina in its opinion filed in this case, discussing the question of non-suit, re-asserts a well established rule of procedure when it says:

"The evidence tended to show negligence on the part of the defendant in assigning the plaintiff, as engineer, to operate a defective engine, which he did not know was out of order. Upon a motion of this kind, the evidence is construed most favorably for the plaintiff, and he is entitled to have considered every reasonable inference therefrom."

Brittain vs. Westhall, 135 N. C., 492;
Freeman vs. Brown, 151 N. C., 111.

The Court's attention is directed to the fact that under the State practice if exceptions in the record are not set out in brief of counsel, and reason and argument stated in support thereof, that the Court will consider them as abandoned. In the present case the Supreme Court of North Carolina, acting under that rule, which is known as Rule 34 of the Supreme

Court of North Carolina, treated the fifth, sixth and tenth assignments of error as abandoned by the plaintiff. The Supreme Court of North Carolina we think properly held that the seventh assignment of error can not be sustained, for the reason that it is referable to the question of damages and would not in any event defeat plaintiff's right to recover.

As we understand, the plaintiff in error in seeking to have the decision of the Supreme Court of North Carolina reversed relies chiefly upon two grounds: First, want of jurisdiction in the State Court to try and determine the issues presented and that the cause should have been removed to the Federal Court for trial. Second, that the defendant in error was not engaged at the time of the injury in interstate employment.

Upon the question of jurisdiction and removal we think there are two reasons, either of which are controlling, against the contention of the plaintiff in error:

First. The suit was brought against the Southern Railway Company, a foreign corporation, and the North Carolina Railroad Company, a domestic corporation, the latter's tracks being operated and controlled under a lease to the former. This Court held in the case of North Carolina Railroad Company vs. Zachary, 58 Law Ed., U. S., page 593, that the North Carolina Railroad Company as lessor to the Southern Railway Company is engaged in interstate commerce, and following the decision of the Supreme Court of North Carolina in Logan vs. North Carolina Railroad Co., 116 N. C., 941, held that an action may be maintained against it for such negligence as is shown in this record.

The Supreme Court of North Carolina in the present case held that suit was maintainable against the Southern Railway Company and the North Carolina Railroad Company as joint tort feasors, and commenting upon the facts at bar said:

"The domestic corporation can not lease its railway and permit its physical connection at both ends with other tracks laid by its lessee, for the more convenient and practical use of the latter's main line acquired from the lessor, without being responsible for torts committed in the use of such lateral or sidetracks. The construction of such tracks was manifestly contemplated by the parties to the lease, and what is author-

ized, expressly or by necessary implication, makes him who gave the authority responsible for any illegal exercise of it. Qui facit per alium, facit per se."

See also Torrence vs. Shedd, 144 U. S., 527.

The petition for removal filed by plaintiff in error was merely docketed in the Federal Court and no action was taken thereon. The lower court having first ordered the case removed, an appeal was taken to the Supreme Court of the State, and upon that hearing the Court held that the case was improperly removed and directed the lower court to proceed with the trial.

Mr. Justice Van Devanter in delivering the opinion of this court in Chesapeake & O. Ry. Co. vs. Cockrell, decided January 19, 1914, and reported in the Advanced Opinions February 15, 1914, discussing the exact question at issue, says:

"Here the plaintiff's petition, as is expressly conceded, not only stated a good cause of action against the resident defendants, but, tested by the laws of Kentucky, as it should be, stated a case of joint liability on the part of all the defendants. As thus stated the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right."

In the further course of this opinion the Court says:

"Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith."

The petition filed by the defendant Railway Company charging fraud and bad faith not only fails to show sufficient ground for removal, but we submit manifests a rather reckless disregard of the facts. The instances of fraud and bad faith relied upon by the petitioner was in joining the North Carolina Railroad as a party defendant and alleging that Lloyd was not engaged in interstate commerce at the time of his injury. This charge was made notwithstanding the fact that the Supreme Court of North Carolina in a long line of decisions has held that the North Carolina Railroad Company was a proper party

defendant with the Southern in actions for personal injury occurring on its line of road, and the Supreme Court of North Carolina expressly holds in this case that it was a joint tort feasor with the Southern, and that the side tracks connected with the main lines at both ends upon which this engine was located were necessarily a part of the North Carolina Railroad system.

This Court has also held in Railroad vs. Zachary, supra, that the contractual relations between the plaintiff in error and the North Carolina Railroad Company makes the latter Company a carrier of interstate commerce and equally liable for tort with its lessee the Southern Railway Company. The facts appearing upon the face of the petition show that the plaintiff Lloyd was engaged in the service of the Southern Railway Company as engineer and "had theretofore run engines with trains from Spencer, North Carolina, to Monroe, Virginia," but as a conclusion of law denies that he was engaged in interstate commerce, and because he does not agree as to its conclusions of law he is charged with bad faith and a fraudulent statement of facts when he contends otherwise. The Court will observe that the facts showing the character of his employment are almost identical with those appearing in the Zachary case, in which case the present plaintiff in error was taking the contrary position to the one urged here. The record in the Zachary case and in this we submit demonstrate that the plaintiff in error does not seek to have its legal rights established through a consistent application of the law, but rather to suit its financial interest as it may arise in different cases.

Second. The third and conclusive reason why the case should not have been removed is that the Act under which the suit was brought expressly conferred jurisdiction upon the State court to try and determine the issue involved, whether the suit had been brought against the North Carolina Railroad Company or the Southern Railway Company, or both jointly. This Court in Kansas City S. R. Co. vs. Leslie, in its opinion reported August 1st, 1915, in the Advanced Opinions, discussing the same question, says:

"The above-mentioned amendment of 1910 declares: 'The

jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.' Section 28, Judicial Code, effective January 1, 1912 (36 Stat. at L. 1095, chap. 231, Comp. Stat. 1913, sec. 1010), specifies causes removable from state courts by nonresident defendants and concludes: 'Provided, that no case arising under an act entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States.' The language of both amendment and Judicial Code, we think, clearly inhibits removal of a cause arising under the act from a state court upon the sole ground of diversity of citizenship. The same conclusion has been announced frequently by lower Federal courts."

As bearing upon the second question, as to whether or not the defendant in error at the time of the injury was engaged in interstate commerce, we call the court's attention to the facts found from the record as stated in the opinion of the Supreme Court of North Carolina, in which it is said:

"He was put in charge of this engine, and his duty, as engineer, required him to inspect it for the purpose of ascertaining whether it was in proper condition for its run from Spencer, N. C., to Monroe, Va. It was in commission for the purpose of moving interstate traffic between those two points. It was not necessary to constitute it an instrument of interstate commerce that it should have started on its journey. This engine was to be employed wholly in interstate commerce, and has been so used since the day of the injury. The work of reparation had been finished in the shops and the engine was run out on the track, preparatory to her next interstate journey. She had been thus used before, and her runs were merely suspended temporarily for the purpose of repairing her, after which the interstate runs would be resumed. Plaintiff was overlooking his engine, expecting to take it out that day or

the next, to Monroe, Va. His work was done only in a preparatory stage of interstate commerce, but was none the less a part of it. The case, in this respect, is governed by N. C. R. R. vs. Zachary, 232 U. S., 248, where the Court says:

"'It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant.'"

In support of this statement of facts the Court quotes the testimony of one of the witnesses for plaintiff in error—H. J. Heileg, as follows:

"Engine 579 is now running between Spencer, N. C., and Monroe, Va., has been since the injury in regular service; may have been off for a few days at the time for local repairs; it was running between those points before the injury; one of the train engines operating between Spencer and Monroe; it was hauling commerce between the two States, between Spencer, N. C., and Monroe, Va."

We think this Court has already determined adversely to the plaintiff in error the question here presented. In Pedersen vs. D. L. & W. Railroad Co., 229 U. S., 146, Justice Van Devanter said:

"The statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But, independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the

assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined, regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

See also St. Louis & San Francisco Ry. Co. vs. Seale, 229 U. S., 156.

The Supreme Court of North Carolina has expressly adopted the application of the rule as enunciated by this Court in the two foregoing cases, and reaffirmed its decision in the Lloyd case, where the precise question here presented was fully considered by that Court in an opinion handed down September 15th, 1915, reported in the Southeastern Reporter of October 9th, 1915, at page 176, et seq.

Concluding its consideration of the case at bar, the Supreme Court of North Carolina says:

"For the reasons stated, we hold that the defendant Southern Railway Company, at the time of the injury, was engaged in interstate commerce, and plaintiff was employed by it in such commerce, so as to make the Federal Employers' Liability Act applicable to the case. The same reasoning applies to the North Carolina Railroad Company, lessor of its co-defendant, as it authorized and is responsible for the latter's acts under its lease, and is, therefore, engaged in commerce between the States, being itself a common carrier. The case of N. C. R. R. Co. vs. Zachary, supra, also disposes of this point, for it was there held that the North Carolina Railroad Company was liable under said act as interstate carrier, under facts and circumstances similar to those shown in the record.

The defendant did not plead assumption of risk, nor was any issue relating thereto tendered by it, or submitted by the court. This is necessary, under our practice and procedure, in order to raise that question, as we regard it as a distinct defense, which must be pleaded and an issue thereon tendered by

the defendant or submitted by the court of its own motion. Dorsett vs. Manufacturing Co., 131 N. C., 254; Eplee vs. R. R., 155 N. C., 293; Bolding vs. R. R., 123 N. C., 614; West vs. Tanning Co., 154 N. C., 44."

Respectfully submitted,

A. L. BROOKS,

Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 286

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

W. L. LLOYD, DEFENDANT IN ERROR

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA

MOTION TO ADVANCE

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1914
No. 718

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

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SOUTHERN RAILWAY CO., PLAINTIFF IN ERROR

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ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION TO ADVANCE

Comes now the defendant in error, W. L. Lloyd, and through counsel respectfully moves the Court to advance this cause for hearing upon its docket at such early date certain as may be agreeable to the Court.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will on the 10th day of May, A. D., 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as the hearing may be had, submit for the consideration of the said Court the foregoing motion, and a statement of the facts and brief as hereto attached, all of which are now served upon you herewith.

A. L. BROOKS.
Attorney of record for defendant in error.

Notice of the foregoing motion, statement of facts and brief is acknowledged, and the date fixed for the hearing of same is consented to.

L. E. JEFFRIES,
Attorney of record for plaintiff in error.

STATEMENT OF FACTS.

This suit was commenced in the Superior Court of Guilford County, North Carolina, under the Federal Employers' Liability Act by W. L. Lloyd against the plaintiffs in error Southern Railway Company, a Virginia corporation, and the North Carolina Railroad Company, a North Carolina corporation. That both the plaintiffs in error were engaged at the time of his injury in inter-state commerce as public carriers, and he was employed by the plaintiff in error the Southern Railway Company in the conduct of its inter-state business, to-wit, as engineer on its trains running from Spencer, North Carolina, through Greensboro, North Carolina, to Monroe, Virginia. The Southern Railway Company is lessee for ninety-nine years of the North Carolina Railroad Company and uses the latter's tracts from Greensboro, North Carolina, to Salisbury, North Carolina, as its main line from North to South. That the defendant in error was injured at Spencer, North Carolina, on a side-track of the North Carolina Railroad's main line between Greensboro and Salisbury; that this side-track was connected at both ends with the main line. The plaintiffs in error duly filed a petition to remove said cause for trial to the United States Court for the Western District of North Carolina; this petition set forth that the State Court had no jurisdiction to try the cause, for that the North Carolina Railroad Company was fraudulently joined as a party defendant in the suit in the State Court, and that the action was brought under the Federal Employers' Liability Act, and should be heard and determined by the United States Court. The defendand in error recovered judgment in the lower court for $12,500.00, which upon appeal to the Supreme Court of the State was affirmed. The plaintiff in error urged before the Supreme Court of North Carolina its exceptions to the jurisdiction of the State Courts to try and determine the issues involved. The Supreme Court of North Carolina sustained the rulings of the State below, and from this judgment a writ of error was sued out by the plaintiff in error to this Court, seeking to review the judgment and decree of the Supreme Court of North Carolina.

The principal question involved upon this writ of error is the jurisdiction of the State Courts to try the case. It is also

urged that the State Court committed error in its interpretation of the Federal Employers' Liability Act, as applied to this case.

The jurisdiction of the State Court and the correct interpretation of the Employers' Liability Act in such cases are matters of general public interest. Substantially all of the inter-state traffiic, both passenger and freight, done by the plaintiff in error from the Northern and Southern connections is carried over the leased lines of the North Carolina Railroad Company. The defendant in error respectfully submits that he was permanently injured in January, 1911, more than four years ago; that the long delays incident to appellate procedure have already worked great hardship; and that if a consideration of the Federal questions presented should be long deferred, he fears that he will not live to receive the partial compensation awarded him by the Courts of his State.

Respectfully submitted,

A. L. BROOKS,

Attorney of record for defendant in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 718. 298

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

versus

W. L. LLOYD, DEFENDANT IN ERROR.

BRIEF IN OPPOSITION TO MOTION TO ADVANCE.

L. E. JEFFRIES,
Attorney for Defendant in Error.

WASHINGTON, D. C., April 30, 1915.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 718.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

versus

W. L. LLOYD, DEFENDANT IN ERROR.

BRIEF IN OPPOSITION TO MOTION TO ADVANCE.

The plaintiff in error, the Southern Railway Company, files this its brief in opposition to the motion of the defendant in error to advance this case upon the docket.

Statement of Facts.

This is a civil action begun in the Superior Court of Guilford County, North Carolina, to recover damages for personal injury sustained by the defendant in error, W. L. Lloyd (hereinafter called the plaintiff), which was alleged to have been caused by the negligence of the plaintiff in error, the Southern Railway Company (hereinafter called the defendant) and its lessor, the North Carolina Railroad Company. The defendant is a Virginia corporation and the North Carolina Railroad Company is a North Carolina corporation. The defendant leases certain lines of the North Carolina Rail-

road Company, all of which are wholly within the State of North Carolina.

The action was brought under the Federal Employers' Liability Act, and it was specifically alleged that both the plaintiff and the defendant were engaged in interstate commerce at the time of the plaintiff's injury. and the specific negligent act set out in the complaint was that the machinery controlling the lever to the ash-pan damper on engine 579 was defective, in that it was improperly adjusted, rendering it liable to be tripped by the slightest jar.

In apt time the defendant filed a petition to remove the case to the Federal court, alleging in the petition, which was verified and accompanied by proper bond, that the amount in controversy exceeded the amount of two thousand dollars; that the controversy was wholly between citizens of different States, to wit, the plaintiff, a citizen of North Carolina, and the defendant, a citizen of the State of Virginia; that the joinder of the resident defendant, the North Carolina Railroad Company, was fraudulent; that the plaintiff was not engaged in interstate commerce at the time of the accident; that engine 579 was not engaged in any kind of commerce at the time of the accident, and that these allegations in the original complaint were fraudulent and false and known by the plaintiff to be fraudulent and false, or could have been ascertained to be false by the exercise of the slightest diligence upon his part.

The trial court declined to remove the case and the defendant excepted, both upon the record and in its answer, to this action of the court.

At the trial of the cause at the February, 1913, term of the Superior Court for Guilford County, upon the close of the plaintiff's testimony, the court intimated that there was no cause of action against the North Carolina Railroad Company, whereupon the plaintiff submitted to a nonsuit as to that company. The defendant immediately filed a second petition for removal, which was verified and accompanied

by proper bond, containing essentially the same allegations as the first petition, as above set forth, and the court granted the petition, and an order was signed removing the said cause to the District Court of the United States for the Western District of North Carolina at Greensboro, and an entry was made of this order upon the minutes of the State court on March 13, 1913. A transcript of said cause was made and said cause was docketed in the District Court of the United States for the Western District of North Carolina, at Greensboro, on March 14, 1913, where it still remains, no motion to remand having been filed.

The plaintiff excepted to the order of removal and to the order of nonsuit as to the North Carolina Railroad Company and appealed to the Supreme Court of North Carolina, which was the highest court in the State. That court reversed the Superior Court of Guilford County, and held that the cause should not have been removed on the ground that the plaintiff was engaged in interstate commerce (the lower court having decided that it was not), and that the North Carolina Railroad Company should not have been nonsuited under the facts.

Upon the second trial of the case, at the September, 1913, term of Guilford County Superior Court, the defendant filed a plea to the jurisdiction, setting forth a history of the case and specifically alleging that the order of removal had not been revoked and that no motion to remand had been made, and that the case was now pending in the District Court of the United States at Greensboro. A similar plea was filed by the North Carolina Railroad Company. These pleas were overruled by the trial court and upon the trial there was a verdict and judgment for $12,500 for the plaintiff against the defendant, and a verdict and judgment for the North Carolina Railroad Company, which upon appeal was affirmed by the Supreme Court of North Carolina, and the case is now here by writ of error to that court.

The material facts disclosed by the evidence are as follows:

Lloyd was an engineer in the service of the defendant and was on the extra list. He had been, for a time preceding his injury, engaged in hauling freight trains between Monroe, Virginia, and Spencer, North Carolina, though he might have been assigned to passenger service. He had no fixed duties and was subject to call to both freight and passenger service, to both intra and interstate work. While assigned to the Monroe-Spencer run his engine, 579, was withdrawn from commerce and shopped for repairs at the Spencer, North Carolina, shop on December 16, 1910. On January 12, 1911, engine 579 was taken out of the shop, the repairs having been completed, and was left on a side-track of the Southern Railway Company. Lloyd was ordered to go to this track and take this engine, coupled to another engine, which had also been in the shop for repairs, on a trial run to Barbers, North Carolina, a distance of eleven miles, and wholly in the State of North Carolina, to see if it was in proper condition and fit to be put back into commerce, and if not to report what further work was needed to make it serviceable. There were no cars of any kind attached or to be attached to this engine. While looking the engine over as it stood upon the side-track of the defendant, before starting on the trial trip, he noticed fire falling freely from the grates of the ash-pan. As he stooped down to look under the engine, in order to see why the fire was falling so freely, he was struck and knocked unconscious by the ash-pan-damper lever, receiving the injury for which this suit was brought. According to the testimony of Lloyd and his witness, a helper, John Perry, he (Lloyd) did not touch the lever, it just tripped from some unknown cause and struck him. According to the evidence of several eye-witnesses for the defendant, Lloyd caught hold of the lever, while standing facing the engine, and jerked it up, the lever striking him in the forehead. Lloyd's testimony, and this was the sole evidence on the question of negligence, was:

"I stooped just about in this position (witness illustrates) in order to see there, get my eyes level—that I might see the bottom of the grate and just at that time when I was in that position this lever tripped and struck me. * * * The tightening of the nut on that rod that extends from the shaft to the damper gave this lever force—made it in the nature of a spring. * * * When the nut and this lever rod is properly adjusted, it is sufficiently easy for a man to operate it safely; that has no danger when properly adjusted, as it remains closed when closed and open when open."

The evidence of the defendant was that one of the repairs that had been made to engine 579 was to the ash-pan damper, and numerous employees, including the man who made the repairs to the ash-pan damper the morning of the accident, and the men who examined engine 579 immediately after the accident, testified that it was not defective in any way; that the lever was properly adjusted both before and after the accident; while it worked a little tight, it was easily operated with one hand. The evidence disclosed that the proper way to operate the lever was to stand with the body facing the way the engine is headed, side to the engine, and when you pull up on the lever the body comes with it; that there is no danger whatever in pulling it up that way; that the lever works on a spring and when pulled past the center it has a tendency to fly up; that Lloyd was an old and experienced employee, having entered the service as fireman in 1889, being promoted to engineer in 1899. The accident occurred on a side-track in the yard of the defendant and more than 200 feet distant from the right of way of the North Carolina Railroad. At no time between the shopping of engine 579 for repairs and the time of the accident was it upon the property of the North Carolina Railroad or in the custody of its employees.

The defendant was operating as lessee certain tracks of the North Carolina Railroad in North Carolina, and the only

possible connection the latter could have with this case was that engine 579, after leaving the track upon which it was standing to make the proposed trial trip to Barbers, would have had to traverse about two miles of tracks leased from the North Carolina Railroad *if it had made the trial trip.* The latter company is a non-operating company and has no rolling-stock or employees.

The defendant strenuously denies the statement of the plaintiff in the motion to advance that the plaintiff was engaged in interstate commerce at the time he was injured. An examination of the record in the case will clearly establish the fact that he was not so engaged.

The defendant also denies, as absolutely incorrect, the statement in the motion that the plaintiff was injured on a side-track "of the North Carolina Railroad Company's main line." On the contrary, it is confidently asserted that there is not a scintilla of evidence to establish this fact, but, on the contrary, it establishes that plaintiff was injured on a side-track of the defendant, which was built since the lease by the North Carolina Railroad Company to defendant, and that the North Carolina Railroad Company has no connection whatever with this case.

Rules of the Supreme Court of the United States Authorizing the Advancement of Cases.

Rule 26 provides for the following call and order of the docket:

Section 1 provides that the cases for argument shall be called in the order in which they stand on the docket.

Section 2 provides that only ten cases shall be considered as liable to be called in any one day.

Sections 3 to 7 provide for the advancement of cases, and are as follows:

> "3. Criminal cases may be advanced by leave of the court on motion of either party.

"4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

"5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, or which may be entitled to precedence under the provisions of any act of Congress, may also by leave of the court be advanced on motion of the Attorney General.

"6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

"7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court."

ARGUMENT.

The present motion to advance can only be considered under section 7, and in order to be advanced by the court there must be shown to it "special and peculiar" circumstances which authorize a departure from the rule laid down in section 1, that all cases shall be called in the order in which they stand on the docket.

It is submitted that there is nothing whatever in either the facts or the law in the present case that justifies the case being given preference over the preceding cases upon the docket. An examination of sections 3 to 6 will show that an ordinary civil case between individuals coming on to be heard for the first time cannot be advanced. It is readily recognized why criminal cases, cases that have been previously adjudicated upon the merits, and cases which involve matters of general public interest should be given precedence within the sound discretion of the court, but no such reason exists in the present case.

An examination of the statement of facts preceding will show that this is a simple ordinary action at law between an

employee and his employer to recover damages for personal injury which he has sustained. It is not believed, considering the case from any aspect, that there is any interest involved other than to the immediate parties to the suit. The principal questions involved are the right of removal from the State to the Federal court and whether there was any negligence proven that would entitle the plaintiff to a recovery under either the State or the Federal law. There are certainly no "special and peculiar circumstances" disclosed by the plaintiff in his motion to advance that would justify this court to advance this case ahead of the many cases that are ahead of it on the docket, in the exercise of a sound judicial discretion.

In 3 Cyc., 205, it is said, citing authorities:

> "While grave public consideration may sometimes justify the court in advancing important cases, as a general rule the mere fact that the questions involved in a cause are of public importance will not necessarily entitle the parties to an advancement of such cause to a hearing in preference to others."

This statement has relation to the advancement of cases under section 7. This general rule has also the sanction of this court, as will appear by an examination of the case of Poindexter *vs.* Greenhow, Treasurer of City of Richmond, 109 U. S., 63, in which Mr. Chief Justice Waite said:

> "The questions involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for imperative reasons."

Also in U. S. *vs.* Fossatt, 21 How., 445, Mr. Chief Justice Taney observed:

> "According to the rules and practice of the court, no case can be taken up out of its order on the docket, where private interests only are concerned."

And in Hoge, Comptroller, *vs.* The Richmond & Danville Railroad Company, 93 U. S., 1, a motion to advance a case in which public interests were involved was denied, though within the terms of the statute, the court, through Mr. Chief Justice Waite, saying:

> "In the present crowded state of our docket, it is incumbent on us to take care that injustice is not done to 'private parties' by the unnecessary advancement of causes affecting public interests."

In view of the facts as above set forth and the law, to which the attention of the court is briefly directed, the motion to advance this case upon the docket of this court should be denied.

We have purposely refrained from arguing the merits of this case on this motion to advance.

Respectfully submitted,

L. E. JEFFRIES,
Attorney for Defendant in Error.

WASHINGTON, D. C., April 30, 1915.

SOUTHERN RAILWAY COMPANY *v.* LLOYD.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 296. Argued November 29, 1915.—Decided January 10, 1916.

The Employers' Liability Act as amended in 1910 expressly provides that the state court has jurisdiction of actions thereunder and no case brought in the state court thereunder is removable to the Federal court merely because of diversity of citizenship.

The right of removal cannot be established by a petition which simply traverses the facts alleged in the complaint; the state court is only required to surrender its jurisdiction over a non-resident defendant joined with a resident when the facts alleged fairly raise the issue of fraud in the joinder.

An order of non-suit in the trial court as to the resident defendant from which plaintiff availed of a right of review by appeal to the higher court, does not make the case removable as to the non resident defendant. *American Car Co.* v. *Kettelhake*, 236 U. S. 311.

There having been testimony supporting plaintiff's allegations that he was engaged in interstate commerce, and the court having charged that the burden was on plaintiff to prove such allegation, the issue was properly left to the jury.

The conclusion of the state court, fully supported by the record that no issue was made or submitted to the trial court as to assumption of risk and therefore, under state practice no question concerning that subject is presented on appeal, denies no right of Federal character.

166 North Carolina, 24, affirmed.

THE facts, which involve the validity of the refusal of the state court to remove an action to the Federal Court and of its judgment in an action brought under the Employers' Liability Act, are stated in the opinion.

Mr. John M. Wilson with whom *Mr. L. E. Jeffries* and *Mr. H. O'B. Cooper* were on the brief for plaintiff in error.

Mr. Aubrey L. Brooks for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

W. L. Lloyd, herein called the plaintiff, brought his action in the Superior Court of Guilford County, North Carolina, against the defendant, the Southern Railway Company, joined with its lessor, the North Carolina Railroad Company. The action was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291.

The North Carolina Railroad Company is a corporation of the State of North Carolina, owning a railroad line extending from Goldsboro, North Carolina, to Charlotte, in the same State. The Southern Railway Company is organized under the laws of the State of Virginia, and is a common carrier engaged in interstate commerce, transporting freight and passengers from the city of Washington, District of Columbia, through Greensboro, and over the tracks of the North Carolina Railroad Company through Spencer, Salisbury and Charlotte.

The petition charges that the Southern Railway Company was, at the time of the injuries complained of, operating as lessee of the North Carolina Railroad Company the roads and side tracks at Spencer; that on January 12, 1911, plaintiff was employed as an engineer by the defendant, Southern Railway Company, upon its freight trains running over said line of road from Spencer, North Carolina, to Monroe, Virginia, and was engaged in interstate traffic; that upon said date he was directed as engineer to take charge of a certain engine at Spencer, to ascertain whether the same was in serviceable condition, as it had just come from the repair shops; that while he was operating the engine on one of the side tracks of the North Carolina Railroad Company's main line at Spencer, and was oiling and inspecting the same, in stooping over the engine to ascertain if the ash-pan and other equipments were in proper condition, a lever about two

feet long, located at the rear of the driving wheel and the lower side of the engine, used for the purpose of operating the damper to the ash-pan, tripped and violently struck the plaintiff in the forehead, causing serious harm and injury; that the defective condition was known to the Southern Railway Company, and unknown to the plaintiff; that the plaintiff, at the time of the injury, was employed by the Southern Railway Company for the purpose of transporting interstate commerce running to and from Spencer, North Carolina, along the main line of the Southern Railway Company, part of which said line included the portion of said North Carolina Railroad Company's line leased by the Southern Railway Company from Greensboro, North Carolina, to Spencer, North Carolina; that the engine upon which the plaintiff was hurt was, and had been, exclusively used by the Southern Railway Company in the transportation of interstate commerce over the line of said road between Spencer and Monroe, Virginia, and that the plaintiff, at the time of his injury, was in charge of said engine. Negligence of the Southern Railway Company is charged in furnishing the plaintiff with an unsafe and dangerous engine, knowing the same to be such, and thereby rendering the plaintiff's employment hazardous and dangerous, and unnecessarily exposing him to peril.

The Southern Railway Company in due season filed its petition for removal of the case to the District Court of the United States for the Western District of North Carolina, because of its diversity of citizenship with the plaintiff, and alleging that the joinder of the North Carolina Railroad Company, the local defendant, was fraudulently made to avoid Federal jurisdiction; that the plaintiff was not engaged in interstate commerce at the time of the accident; that the engine upon which he was injured was not engaged in any kind of commerce at the time of the accident; and that these allegations in the petition were

fraudulent and false, which the plaintiff knew, or could have ascertained by the exercise of the slightest diligence upon his part. The court refused to remove the case, to which refusal the Southern Railway Company excepted.

Upon issue joined, the case came on for trial at the February Term, 1913, of the Superior Court of Guilford County. At the close of plaintiff's testimony, the court intimated that there was no cause of action against the North Carolina Railroad Company; upon this intimation a non-suit was taken as to that company. Thereupon the Southern Railway Company filed a second petition for removal which the court, after argument, granted, and an order was made, removing the case to the District Court of the United States for the Western District of North Carolina. The plaintiff excepted to this order of removal, and to the non-suit as to the North Carolina Railroad Company, and upon appeal to the Supreme Court of North Carolina that court held that the case should not have been removed, and remanded it to the Superior Court of Guilford County for trial. 162 Nor. Car. 485.

The case coming on again for trial in the Superior Court, the Southern Railway company renewed its objections to the jurisdiction by a plea, and set up that the case had been docketed in the District Court of the United States for the Western District of North Carolina, that no motion had been made to remand the same, that the order removing it had not been revoked, and that the case was then pending for trial in the District Court as aforesaid. The North Carolina Railroad Company also filed a plea to the jurisdiction. These pleas were overruled, and upon trial a verdict and judgment was rendered in favor of the plaintiff. Upon appeal to the Supreme Court of North Carolina, that judgment was affirmed. 166 Nor. Car. 24.

From the statement of the case already made, it is apparent that the plaintiff sought to recover under the

Federal Employers' Liability Act, joining both railroad companies upon the theory that the lessor company remained liable under the law of North Carolina upon the cause of action asserted by the plaintiff. See *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. On the face of the petition a case was made invoking the jurisdiction of the state court to recover under the Federal act, because of the negligence charged. That the state court had jurisdiction of such an action is expressly provided by the Federal statute. Act of April 5, 1910, c. 143, 36 Stat. 291.

In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face. *Chesa. & Ohio Rwy.* v. *Cockrell*, 232 U. S. 146. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the state court is required to surrender its jurisdiction. The order of non-suit in the trial court as to the North Carolina Railroad Company, appealed from by plaintiff with the right of review in the Supreme Court of the State, did not make the case removable as to the Southern Railway Company. *American Car Co.* v. *Kettelhake*, 236 U. S. 311. Moreover, as we shall see later, under the Employers' Liability Act, no case is removable merely because of diversity of citizenship.

The act of 1910, *supra*, expressly gives jurisdiction to the state court, and provides that no case arising under its provisions brought in a state court of competent jurisdiction shall be removed to any court of the United States. Section 28 of the Judicial Code, 36 Stat. 1087, 1094, contains a like provision, and expressly provides that no case arising under the Employers' Liability Act or any amendment thereto, brought in a state court of competent jurisdiction, shall be removed to any court of the United States. The question of the effect of this provision upon the right

to remove a case because of diversity of citizenship, since the passage of the act referred to, was before this court and passed upon in *Kansas City Southern Rwy.* v. *Leslie*, 238 U. S. 599. It was therein held that there was no authority to remove such action from the state court to the Federal court because of diversity of citizenship. Nor did the alleged fraudulent joinder of the local defendant in the state court give such right. *North Carolina R. R.* v. *Zachary, supra.* And see *Chicago, Rock Island & Pacific Ry.* v. *Whiteaker*, decided in this court, December 20, 1915, *ante*, p. 421. Such right did not arise from the allegation of the removal of the petition that the injury did not happen in interstate commerce. *Chesa. & Ohio R. R.* v. *Cockrell, supra.* It follows that the state court did not err in its judgment as to the right of removal upon the facts presented in this case.

As to other questions of a Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect. *North Carolina R. R.* v. *Zachary, supra; Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *New York Central R. R.* v. *Carr*, 238 U. S. 260; *Pennsylvania Co.* v. *Donat*, decided by this court November 1, 1915, *ante*, p. 50.

The court properly refused the request as to contributory negligence and gave the rule laid down in the Em-

ployers' Liability Act. As to assumption of risk, the Supreme Court held that no such issue was made or submitted to the trial court, (a conclusion fully supported by the record,) and therefore under the state practice no question concerning that subject was presented on appeal. This conclusion denied no right of a Federal character.

Judgment affirmed.